



USAID
FROM THE AMERICAN PEOPLE

SOUTHEAST ASIA COMMERCIAL LAW AND TRADE DIAGNOSTICS – LAOS

FINAL REPORT



November 2006

This publication was produced for review by the United States
Agency for International Development by Booz Allen Hamilton

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT



SOUTHEAST ASIA COMMERCIAL LAW & INSTITUTIONAL REFORM AND TRADE DIAGNOSTICS – LAOS

Final Report

November 2006

Booz | Allen | Hamilton

delivering results that endure

Contract No. PCE-I-00-98-00013
Task Order No. 13 The Seldon Project

DISCLAIMER

The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
A.	Laos: An Island in a Sea of Dynamism	1
B.	The SEA CLIR Trade Diagnostic: A Regional Initiative	2
C.	The Methodology of Diagnostic: A 360° Review	3
D.	Summary of Subject-Specific Findings	5
E.	Cross-Cutting Themes in Legal and Institutional Reform.....	9
II.	COMPANY LAW AND CORPORATE GOVERNANCE.....	15
A.	Introduction.....	15
B.	Legal Framework.....	15
C.	Implementing Institutions	20
D.	Supporting Institutions.....	21
E.	Social Dynamics	21
F.	Recommendations.....	21
III.	CONTRACT LAW AND ENFORCEMENT.....	23
A.	Introduction.....	23
B.	Legal Framework.....	23
C.	Implementing Institutions	25
D.	Supporting Institutions.....	28
E.	Social Dynamics	30
F.	Recommendations.....	32
IV.	REAL PROPERTY LAW.....	33
A.	Introduction.....	33
B.	Legal Framework.....	33
C.	Implementing Institutions	37
D.	Supporting Institutions.....	38
E.	Social Dynamics	38
F.	Recommendations.....	38
V.	SECURED TRANSACTIONS LAW.....	40
A.	Introduction.....	40
B.	Legal Framework.....	40
C.	Implementing Institutions	41
D.	Supporting Institutions.....	42
E.	Social Dynamics	43
F.	Recommendations.....	43
VI.	BANKRUPTCY LAW.....	44
A.	Introduction.....	44

B.	Legal Framework	44
C.	Implementing Institutions	45
D.	Supporting Institutions.....	47
E.	Social Dynamics	47
F.	Recommendations.....	49
VII.	COMPETITION LAW AND POLICY	51
A.	Introduction.....	51
B.	Legal Framework	51
C.	Implementing Institutions	55
D.	Supporting Institutions.....	56
E.	Social Dynamics	57
F.	Recommendations.....	58
VIII.	COMMERCIAL DISPUTE RESOLUTION.....	60
G.	Introduction.....	60
H.	Legal Framework	60
I.	Implementing Institutions	64
J.	Supporting Institutions.....	66
K.	Social Dynamics	69
L.	Recommendations.....	70
IX.	COURT ADMINISTRATION.....	72
A.	Introduction.....	72
B.	Legal Framework	72
C.	Implementing Institutions	75
D.	Supporting Institutions.....	76
E.	Social Dynamics	76
F.	Recommendations.....	77
X.	FOREIGN DIRECT INVESTMENT	78
A.	Introduction.....	78
B.	Legal Framework	78
C.	Implementing Institutions	81
D.	Supporting Institutions.....	82
E.	Social Dynamics	84
F.	Recommendations.....	85
XI.	INTERNATIONAL TRADE LAW AND POLICY.....	86
A.	Introduction.....	86
B.	Legal Framework	86
C.	Implementing Institutions	90
D.	Supporting Institutions.....	91
E.	Social Dynamics	91
F.	Recommendations.....	92

XII.	FLOW OF GOODS AND SERVICES.....	93
A.	Introduction.....	93
B.	Legal Framework.....	93
C.	Implementing Institutions	96
D.	Supporting Institutions.....	99
E.	Social Dynamics	107
F.	Recommendations.....	109
XIII.	FLOW OF MONEY	112
A.	Introduction.....	112
B.	Legal Framework.....	112
C.	Implementing Institutions	113
D.	Supporting Institutions.....	114
E.	Social Dynamics	114
F.	Recommendations.....	114
XIV.	FLOW OF PEOPLE.....	115
A.	Introduction.....	115
B.	Legal Framework.....	115
C.	Implementing Institution.....	116
D.	Supporting Institutions.....	116
E.	Social Dynamics	117
F.	Recommendations.....	117
XV.	FINANCIAL CRIMES.....	118
A.	Introduction.....	118
B.	Legal Framework.....	118
C.	Implementing Institutions	120
D.	Supporting Institutions.....	121
E.	Social Dynamics	121
F.	Recommendations.....	122
XVI.	INTELLECTUAL PROPERTY	123
A.	Introduction.....	123
B.	Legal Framework.....	123
C.	Implementing Institutions	124
D.	Supporting Institutions.....	124
E.	Social Dynamics	125
F.	Recommendations.....	125

I. Introduction

A. Laos: An Island in a Sea of Dynamism

Although the government of the Lao PDR (hereinafter “Laos”) began allowing private enterprise and loosened its grip upon the economy in 1986, the country remains far behind its economically dynamic neighbors, Thailand, China, and Vietnam. The Lao population remains comparatively small, only about 5.7 million people, and much of the country is very sparsely inhabited. Laos has potential competitive advantages, particularly in natural resources, low-cost labor, and a central location. Its landlocked position, long considered a disadvantage, could be exploited as the neighboring economies create land-links among them. With Laos’ topography there is considerable potential for hydropower production. There has been strong and sustained economic growth in Laos, averaging about 6% *per annum* between 1988 and 2004, except for the country’s participation in the 1997 regional downturn. However, this growth has been narrow and shallow – an artifact of ultimately unsustainable resource exploitation (chiefly timber) and the spill-over of economic activity from neighboring countries. It has not served to lift the country out of poverty, and Laos remains a “Least Developed Country” (LDC). The chief impediment to more robust and deep economic growth is the lack of commitment to the economic reforms necessary to provide a good business climate that might attract investment. Instead, Laos’ economy remains donor-driven, and foreign aid remains its mainstay.

The Lao Government has endorsed a “National Growth and Poverty Reduction Strategy” (NGPES), aimed at “enhancing growth and development and reducing poverty.”¹ This document is far-reaching – though it is also criticized as being largely the creation of international donors, with little Lao Government buy-in. Nonetheless, it calls for a range of economic and legal reforms, along with many items of infrastructure development and improvements in health and education. In 2006, the NGPES was referred to in the government’s all-important Five-Year Plan, a significant step toward greater credibility.

Some conditions have improved. In recent years the corpus of laws in Laos has been expanded, and the laws are mostly available in English versions for potential investors to examine. The Customs Office is working to streamline its procedures. On paper, the investment climate in Laos is liberal, with 100% foreign ownership permitted and no limits on repatriation of profits. In practice, however, Laos remains close to the bottom of international indices measuring the comparative ease of investing and doing business. An area of particular concern is the financial sector, still dominated by non-viable state-owned commercial banks and harboring regulations against foreign banks that operate outside of the capitol.

There are some positive developments that link Laos to its Southeast Asian neighbors. The Nam Theun II Hydropower Project, a \$1.2 billion, 1090 MW hydroelectric dam and generating facility, financed and constructed by a consortium of investors, is critically important to future revenues. Once on-line in 2010, it will gradually build revenue levels to about \$100 million *per annum*. The electricity will be sold to Thailand. Other large hydropower projects are in the works

¹ Government of Laos, National Growth and Poverty Eradication Strategy (undated, but reportedly published in October 2003), available at http://www.poweringprogress.org/ngpes/images/NGPES%20document_new.pdf.

with Vietnamese and Chinese customers for the power. In addition, Laos has obligations under its ASEAN/AFTA tariff and trade commitments, commitments that will help to unfetter and liberalize business in the country. The Bilateral Trade Agreement with the United States, which entered into force at the beginning of 2005,² constitutes a full “dress rehearsal” for Laos’ accession to the World Trade Organization, something the Lao Government has committed itself to accomplish.

Whether Laos is prepared or not, it will very soon be confronted with trans-border regional and world trade issues that it has never dealt with in the past. The influences and the demands of its neighbors will make themselves felt as Laos integrates with a regional market economy in which rule of law, effective arbitration, and standards of commercial behavior are highly important. As detailed in this report, meeting the demands of that wider economic world will require laws, institutions, human resources, and financial wherewithal that do not currently exist in the country.

B. The SEA CLIR Trade Diagnostic: A Regional Initiative

This Report constitutes one installment of a USAID-sponsored initiative in understanding and responding to economic growth, harmonization, and integration efforts in four emerging economies of South-East Asia – specifically, Vietnam, Laos, Cambodia, Thailand, and the Philippines. The South-East Asia Commercial Law and Institutional Reform and Trade Diagnostic Activity (“SEA CLIR Trade”) is designed to allow USAID’s Regional Development Mission/Asia, the governments of these countries, and other interested entities to better understand the opportunities for reform in South-East Asia’s commercial law and trade environment. It also establishes a baseline on which USAID can prioritize its future regional technical assistance.

SEA CLIR Trade first examines the status of commercial law and trade facilitation in each of the participating states, including each country’s respective strengths, weaknesses, and opportunities for development. Specifically, through the comprehensive methodology established through USAID’s Seldon Project for Global Trade Law Assessment and Assistance,³ the Diagnostic examines the following topics:

- Company Law
- Contracts Law and Enforcement
- Real Property Law
- Secured Transactions Law
- Bankruptcy
- Commercial Dispute Resolution
- Court Administration
- Competition Law
- Foreign Direct Investment
- International Trade Law

² See *Lao People’s Democratic Republic–United States Free Trade Agreement*, Sept. 18 2003, implemented by Pub. L. No. 108-429 (December 4, 2004); entered into force February 4, 2005.

³ Detailed information about the Seldon Project can be found at www.bizlawreform.com.

Financial Crimes
Intellectual Property
Flows of Goods and Services across Borders
Trade-Related Flows of People
Trade-Related Financial Flows

Then, based on individual country reviews and organized opportunities for broad-based response to the country findings, SEA CLIR Trade is designed to yield an overall Regional Diagnostic that will:

- Make intra-regional and subject-matter comparisons of international trade and commercial legal frameworks and associated institutions;
- Identify regional commercial law reform and trade-capacity needs and establish program- and project-level priorities;
- Benchmark and evaluate regional progress toward an international trade and business-friendly legal and regulatory environment; and
- Provide analytical and planning tools and metrics that will help to design new regional strategies and approaches for sustainable, cost-effective reform activities.

C. The Methodology of Diagnostic: A 360° Review

The examination of commercial law and institutions and trade-related law and institutions in South-East Asia, from both an individual country and regional perspective, involves a comprehensive yet flexible framework for analyzing a complex and dynamic development challenge. Taking data from a broad spectrum of stakeholders, the Diagnostic builds a “360° picture” of the challenge:

Legal Framework. The Diagnostic first examines the laws and regulations that the SEA CLIR Trade countries have in place that serve as the structural basis for its ability to achieve and sustain market-based development. The Diagnostic poses the following questions: How closely do existing laws reflect emerging global standards? How well do they respond to commercial realities that end-users’ face? What inconsistencies or gaps are present in the legal framework? Often discovered through this review are opportunities to make relatively small changes that may result in significant openings for business development and expansion.

Implementing Institutions. Next, the Diagnostic examines those institutions that hold primary responsibility for implementation and enforcement of the legal framework and subsidiary laws, regulations, and policies governing one or more of the areas addressed in this Report. For example, courts are usually a crucial institution in the examination of commercial law. Problems uncovered often relate to bureaucratic inefficiency, lack of resources and training, and, of paramount concern, real or perceived corruption. With respect to the flow of goods, services, and people, Customs and Immigration authorities are the chief implementing institutions.

Supporting Institutions. The Diagnostic then considers the environment of organizations, individuals, or activities without which the legal framework or policy agenda cannot be fully developed, implemented, or enforced. Examples include notaries, lawyers, banks, business support organizations, professional associations, universities, and other similar ancillary service providers. Of particular interest with respect to supporting institutions is whether they have any meaningful involvement in *what the law says*. Where there has been “buy-in” from affected constituencies, a law and its commensurate system for implementation are more likely to be understood, to be used properly, and to achieve their overall purpose.

Social Dynamics. Finally, studying social dynamics entails asking whether the affected constituencies of a law or policy perceive a need for change, and, if so, how they are demonstrating this need. Are they effectively lobbying those institutions that can make a change? Is the media seizing the issue as a topic of public concern? Are individuals speaking out? Or, have social dynamics taken a less positive approach – for example, is the “gray economy” growing as a response to overly burdensome conditions for market entry? Analysis of social dynamics may affect how an assistance project is ultimately designed. Where outside participation is strong and public understanding high, a reform program may simply involve a relatively small number of government officials who are capable of meeting the demands. In contrast, where mistrust and misunderstanding are abundant, an approach that involves significant engagement of “end-users” will likely be necessary.

Following a country Diagnostic of Vietnam in September 2005, the second stage of the SEA CLIR Trade initiative took place from January 31-February 10, 2006, when a team of commercial law and trade professionals traveled to Laos to conduct a comprehensive Diagnostic of that country’s laws, public and private sector institutions, and social dynamics pertaining to commercial law and trade. The team consisted of the following individuals:

- Andrew Mayock (*Team Leader*) (Flows of Money, Flows of People);
- Peter J. Baish (Flows of Goods and Services);
- Joanne Cornelison (Flows of Goods and Services);
- Thomas N. Jersild (Company Law, Real Property Law);
- Douglas M. Muir (Contract Law, Secured Transactions, and Bankruptcy);
- Maria Coppola Tineo (Competition Law and Policy);
- Louise D. Williams (Commercial Dispute Resolution, Foreign Direct Investment, International Trade Law, Intellectual Property);
- Scott Worden (Court Administration, Financial Crimes);
- Amy Allen (Administrative Support).

Through a series of meetings with a far-reaching representation of over 100 public and private actors who participate in Laos’ economic activity, in concert with a comprehensive review of many documents prepared to date that touch upon one or more aspects of the SEA CLIR Trade initiative, the team developed broad findings with respect to Laos’ relative strengths, weaknesses, and opportunities. On February 10, 2006, the team conducted a roundtable discussion with representatives of the Government, the private sector, and the donor and diplomatic community, and received various insights from representatives of several stakeholding groups pertaining to its preliminary findings. This Report now summarizes the team’s

findings in each of the four areas of review – legal framework, implementing institutions, supporting institutions, and social dynamics – and includes recommendations for specific areas of reform. Although this Report centers specifically on the commercial law and trade environment in Laos, its overriding purpose remains comparative, and it will be especially useful as the SEA CLIR Trade initiative examines the same set of issues in the other SEA CLIR Trade countries.

Over two weeks, the team received invaluable assistance in preparing for, facilitating, and executing its assessment from the U.S. Embassy in Laos, including the generous guidance of Ambassador Haslach and Economic Officer Scott Rolston; the USAID regional mission in Thailand, through the support of USAID Regional Development Mission Director Tim Beans as well as Skip Kissinger, the Director of its General Development Office; and USAID's Bureau of Economic Growth, Agriculture, and Trade, in particular Senior Commercial Law Reform Advisor Charles Schwartz. The team is particularly grateful to the Government of Laos and the Vientiane-based Laos Consulting Group for their respective participation and assistance. Scores of individuals from throughout the Lao Government, including various public-sector institutions, as well as from the private sector, the donor community, the university community, and a wide sample of supporting institutions proved enormously helpful in providing a candid and thorough view of the commercial law and trade sectors. The team is very grateful for the assistance and contributions of all of these individuals and institutions. The team is further grateful for the feedback provided on early drafts of this Report from various U.S. Government representatives and from representatives of USAID's Vietnam based STAR project (Support for Trade Acceleration).

D. Summary of Subject-Specific Findings

The findings of the 15 subject-matter areas examined in the Diagnostic are summarized as follows:

Company Law. The start-up process for new businesses in Laos is lengthy and unpredictable – so much so that this can be considered the number one problem under the Company Law. The company start-up process should be completely revamped and streamlined. Start-up is not the only issue. The Company Law also lacks many of the fundamental provisions for investor control and protection that, more than ever, are needed to attract outside investment and meet international best practice. An all-new Company Law is needed on other points as well. Such a new law is already being drafted and is at an advanced stage of review. Yet, even if that draft contains a simplified registration process, significant implementation work will be in order, considering how deeply entrenched the present company start-up system is. A comprehensive implementation strategy must include private sector capacity-building, training of pertinent Ministry or provincial staff, reconciliation of inconsistent and overlapping practices, and public education.

Contracts Law. Laos is in a state of transition concerning the use of contracts in business practices. The Contract Law is outdated and overdue for a rewrite. There is not a strong tradition of written contracts in Laos; indeed, outside of the cities, written contracts or leases are the exception rather than the rule. Many contracts are written by non-lawyers. Even when lawyers do

draft contracts, the resulting documents are often of low quality. Except among foreign investors and large enterprises, contract negotiation and drafting are not given a high priority. The implementing institutions are weak and contract enforcement is slow and unreliable. On the other hand, written contracts are becoming more common and widely accepted in Laos. Among businesses, at least, contract negotiation is becoming an accepted practice. Lawyers are gradually becoming more adept at writing contracts. Various sorts of form contracts are coming into use, and both written and oral contracts benefit from several mechanisms of non-judicial dispute resolution.

Real Property Law. Laos' Constitution provides that all land is permanently owned by the State, which is not conducive to a free market in land transactions. Furthermore, Laos has never had a reliable, standardized system of land survey and titling. Under recently enacted land laws, however, Lao citizens may hold rights to *use* land which are quite similar to ownership rights as those are known in the West. In addition, there are several means by which foreign persons can share in those rights through leasing, holding of beneficial ownership, acquisition of Government concessions, and other devices. Also, a comprehensive ongoing survey and titling project is now in process with donor help which in several more years should cover much of the significant commercially desirable land in Laos. Thus, as a practical matter, there is a relatively active market in land transactions and there is some de facto foreign "ownership." Both are more constrained and not as secure as they would be in market-economy countries and as they should be for optimal future economic development in Laos.

Secured Transactions Law. Laos lacks most of the critical elements that make up an effective secured lending environment, including a proper legal framework, an effective registration system, and an effective system of enforcement. As a result, there is almost no secured lending in Laos, even against real property. A few lenders are willing to take security interests in vehicles, and there is some consumer credit for household goods in Vientiane. Otherwise, banks actively avoid taking security interests in movable assets.

Bankruptcy. Laos has a Bankruptcy Law, but virtually nobody uses it. There is only one active case of formal bankruptcy; it has been in stasis for over a year, and is not expected to be resolved soon. Under the current legal framework, it is unlikely that there will be many more. There is very little understanding of what bankruptcy is and what purpose it serves. This is true of all but a few very sophisticated actors. State-owned banks, government officials, and private lawyers and businessmen alike, all view bankruptcy as a pathological and vaguely shameful condition. That said, a new Bankruptcy Law, while desirable, is probably not the highest priority for Laos at this time. The current law is flawed, but even a well-drafted law might not get much use, because the environment does not favor formal insolvency. The dominance of State-Owned Enterprises and State Owned Banks; the lack of secured transactions; the very marked tendency for banks to over-collateralize; the lack of sophisticated assessors and appraisers; the weakness, politicization, and general lack of capacity of the courts – all of these push creditors away from filing for bankruptcy.

Competition Law. The overarching goal of adopting a competition law is to create a regulatory framework to enhance efficiency and consumer welfare. Recognizing these benefits, the Government of Laos has engaged in efforts to design a comprehensive competition policy

strategy. Chiefly, the Office of the Prime Minister issued a Decree on Trade Competition in 2004, which is intended to serve as a starting point for the enactment and implementation of a national competition law. The challenges now lie in creating an enforcement agency and preparing effective legislation. Success in both of these endeavors will depend on building the necessary political support, as well as widespread education and consensus-building to inform business and consumers of the benefits of competition. Overall, considerable effort on the part of Government is needed to improve Laos' competitive environment so that the country may maximize the benefits of membership in ASEAN and the ASEAN Free Trade Area, and a market economy more generally.

Commercial Dispute Resolution. The state of Commercial Dispute Resolution in Laos discourages the growth and diversification of existing domestic businesses and presents an almost overwhelming disincentive against foreign direct investment at any level other than the highest scale. Although a relatively sound framework of laws now supports the resolution of commercial cases – one that, in fact, effectively incorporates the country's strong tradition in favor of Alternative Dispute Resolution – vast challenges remain. The desperately needed reforms in the arena of Commercial Dispute Resolution begin with Laos' system of basic and legal education, where conditions are exceptionally weak. The need for reform further encompasses the courts – in particular, the recently established commercial court “chambers” at the provincial and appellate levels – along with the various executive-branch institutions that have judicial-related functions. Also, the fact that the universe of implementing regulations in Laos is virtually unknown and inaccessible means that courts, executive agencies, and private parties have very limited knowledge of their actual rights and responsibilities.

Court Administration. Laos' court system is characterized by low volume and low capacity. To date, the courts have heard very few commercial cases (and relatively few civil cases generally) and almost none involving significant foreign transactions. Laos' court administration is significantly impaired by a lack of resources and a lack of well-trained staff. Although some courts have stand-alone computers, the case management system, docketing, record keeping, and decisions are all performed by hand. Court records are technically public, but are generally unavailable to anyone other than the immediate parties to a dispute. In many cases, relevant departments such as the Ministry of Justice reported difficulties in obtaining judgments or other documents to execute their functions. This difficulty reflects a system of record keeping that is based on handwritten ledgers and in which many court decisions are not intended to be kept after the conclusion of a proceeding.

Foreign Direct Investment. Considerable institutional reform must take place in Laos before it will be a competitive destination for foreign investment in Southeast Asia. To a certain extent, a handful of recent large-scale investments in the hydroelectricity and mining sectors have enhanced the capacity of Laos to manage the interests of outside investors. Investment on a small or medium-scale basis, however, remains overwhelmingly discouraged by lengthy, non-transparent bureaucratic processes; inadequate human resources; a weak national infrastructure; a negligible domestic market; and an unreliable legal system. In short, there is little sense at this time that the possible rewards derived from investing in Laos, other than at the highest scale or in certain niche markets, can overcome the considerable risk.

International Trade Law. Laos' primary exports are garments, wood products, coffee, electricity, and tin. Its exports were valued at \$379 million in 2005, while its imports were valued at \$541 million. Clearly, the country's trade deficit needs remedying, particularly in a region where exports represent a critical component of economic development. Although resolution of this issue begins with capacity-building and increased competitiveness in the business sector, it will necessarily involve trade policy as well. To that end, Laos is working toward a liberalized trade environment, but the country remains significantly behind its neighbors. Existing trade agreements, including the ASEAN Free Trade Agreement, the GMS, and the new bi-lateral trade agreement Laos holds with the United States, require a bolstering of efforts to meet the country's commitments, including implementation of reforms in the areas of customs, intellectual property, and trade facilitation. In addition, the ambiguity of Laos' legal and regulatory structure will need to be remedied before a legislative plan can be established and thereafter pave the way toward WTO accession.

Flow of Goods and Services. Laos is moving forward with improvements to the flow of goods and services into and out of the country, yet enormous challenges remain. A new Customs Law was enacted on May 20, 2005. Though promising in scope, the ultimate success of this law will depend upon the language and implementation of the decrees that are now being negotiated and drafted by the Laos Customs Agency and other authorities. For reforms to be properly implemented, Customs *must* reorganize into a form that permits strong central control of revenues, employees, and ports. Until centralization is realized, little more can be accomplished to enhance trade facilitation. Furthermore, at this time, the trade community in Laos is generally not well served by either the public or private supporting institutions in Laos. Many problems arise because of lack of capacity of personnel in sectors, complicated and burdensome procedures, and the unavailability of quality transport and Customs clearance professionals. The government has taken steps in recent years to address these issues and to simplify procedures with some success. Strategic plans have been developed to strengthen the transport industry and to regulate Customs brokers, but these initiatives often lack proper implementation at the provincial level where regulatory power is entrenched. Nonetheless, the trade community is slowly gaining some collective power to influence change in the service institutions. Transport costs have been reduced but still exceed those of neighboring countries. Significant reforms in the transport arena are long overdue.

Trade-Related Financial Flows. Cross-border transactions reflect a low amount of monetary exchange, especially compared to neighboring countries. Under \$2 billion in goods and services were traded in 2005 –\$659 million in exports and \$1.1 billion in imports. Net FDI inflows amounted to \$265 million in 2005, which was up slightly from \$256 million in 2004. The banking system is small with domestic and foreign banks present. Overall, Lao laws, as well as public and private institutions do not support these trade-related money flows. Basic trade finance products are not available widely to traders, even though some banks technically provide a full range of international banking services, including import and export letters of credits, import and export collections, bond and guarantees, inward and outward transfers and payments. Foreign currency exchange, while available, is not easily exchanged for all traders. Although Laos has made progress in trade-related finance over the past decade, the country needs to do much more if it is to grow and compete

Trade-Related Flows of People. In the SEA CLIR TRADE region, Laos, not surprisingly, sees the lowest flow of people across its borders. Yet, land-locked Laos has seen its share of visitors rise dramatically. Total arrivals in 2005 passed the 1 million mark. The largest number of visitors are from Thailand (603,189), Vietnam (165,151), U.S. (47,427), China (39,210) and France (35,371). Trade-related flows of people resulted in prized foreign-exchange revenues of \$146 million in 2005, up from \$113 million in 2002. Overall, within Lao laws, as well as public and private institutions, significant improvements have been made in the facilitation of the flows of trade-related people. The Lao government has lessened legal travel restrictions, streamlined processes and upgraded its automation. Laos needs to accelerate and broaden reforms in order to meet its target of two million arrivals generating \$290 million by 2010.

Financial Crimes. Financial crimes, including money laundering and terrorist financing, are not a primary focus of the Lao government, nor do they appear at the moment to be a pressing problem in Laos. Conditions are, however, ripe for exploitation. Laos operates on a largely cash economy and has relatively porous borders, weak central banking controls, and unsophisticated law enforcement and banking sectors. One reason why financial crimes do not seem urgent is that so little is known about the true picture of money flows into and out of the country. The most significant known source of illegal capital is proceeds from drugs, which may amount to between \$70-80 million in revenue for traffickers per year, followed by illegal logging. There have also been discoveries of counterfeit U.S. currency and the occasional seizing of large sums of cash in a briefcase at the airport. But this appears to be the extent of active monitoring by the government of potentially illegal financial flows. The Lao government is beginning to take measures aimed at prevention, but there is a long way to go. An anti-money laundering law, an anti-terrorist financing law, and revisions to the penal code that would criminalize related acts of laundering and bribery are still in draft phase. Little information was available as to the specific content of the drafts or the timing of their enactment.

Intellectual Property. The culture of respect for intellectual property rights in Laos is essentially similar to that found in its SEA CLIR neighbors – namely, there is little tradition or public reinforcement that supports such rights. The fact that Laos' economy is so small, however, means that it presents far less of a threat to international commerce and foreign investment than that presented by Vietnam, in that Laos produces no pirated materials and consumes few. For example, notwithstanding the lack of effective infrastructure in support of IPR, Laos is not on USTR's Section 301 "Watch List" for 2006. The country's long-term interest in joining the World Trade Organization may force Laos to acknowledge IPR as a priority, after which the development and implementation of a comprehensive legal framework may follow. One other source of pressure for IPR protection may be the foreign investment community, particularly as foreigners seek to take advantage of Laos' low wage scale to manufacture products demanding design protection.

E. Cross-Cutting Themes in Legal and Institutional Reform

Along with the subject-specific findings summarized above, certain cross-cutting themes emerged with respect to CLIR and trade in Laos. These themes include the following: (1) Laos' almost overwhelming needs in the area of human resources, beginning with primary and secondary education, but also including university education and continuing education for

professionals; (2) opacity in law-making and under-accessibility of the law; (3) the ruling Party's lack of appreciation for the role that the private sector – small and medium-sized enterprises in particular – can play in moving economic development forward in Laos; and (4) given Laos' relative backwardness, the importance of staging concurrent inquiries and leveraging the best practices developing in the region to assist Laos in the near future.

Human resources in Laos: A development imperative against a non-conducive backdrop. Throughout the Diagnostic, a variety of descriptive terms and metaphors arose with respect to the relative quiet, calm, and lack of self-promotion within Lao society. These were generally couched in terms that emphasized cultural reasons why many aspects of economic development may be inappropriate in the Lao context. Of course, what might be negatively perceived as “passivity” in one context can also represent a positive force in another – for example, Laos' unhurried and friendly atmosphere can be counted as an asset where tourists are concerned or where certain businesses may hold interest in becoming established. Moreover, it is never the goal of international development to change the character of a people or the spirit of a nation. The notion that Laos is a “laid back” place can, in many respects, be viewed as a competitive advantage.

That said, the related perceptions that the Lao people are not particularly productive, lack market-oriented skills, and are not inclined toward entrepreneurialism – and therefore will always come up short with respect to economic development – may be less reflective of shared cultural traits than of a lack of opportunity that begins from childhood. Namely, vast deficiencies in education exist at the primary level and continue at all subsequent stages. In a country with a nominal private sector and little employment beyond agriculture or the Government, the personal trait of ambitiousness has very little chance to be nurtured or to flourish. Among the facts and observations pertaining to the general state of human resources that arose during this Diagnostic are the following:

- At the primary and secondary level, teachers in Laos are paid next to nothing. Children often are malnourished or required to work during school hours. School books are commonly unavailable to students in the provinces.
- At all educational levels, skills such as writing, research, and analysis are rarely encouraged or practiced.
- The common understanding that those individuals who criticize the Government or the Party will “vanish” discourages the development of critical thought and risk-taking behavior at all educational and professional levels.
- The main Law Faculty in Laos holds virtually no capacity whatsoever to train new lawyers to practice within and support a market-oriented commercial law system. Faculty has little awareness of fundamental commercial law concepts, including company law, contract law, or secured transactions, and virtually no understanding whatsoever of more sophisticated topics, including competition law, intellectual property, or international trade law.
- Because the State stands as the primary source of employment outside of subsistence farming or micro-enterprise, education is rarely correlated with greater opportunity or

prosperity. For example, although the Law Faculty operates a night school that mainly serves State workers, attainment of a law degree is not generally seen as a way to improve one's economic circumstances: "Everyone makes the same salary," one local observer explained.

- In the words of one international accountant, "All the people in the country capable of conducting a complex audit or other high-end accounting function could be seated around a table." Laos does not use international accounting standards (IAS).
- There are few people in Laos with the necessary commercial and administrative competencies to administer large or complex bankruptcies.
- Various students and professionals have access to such opportunities as scholarships, study tours, and short and long-term training programs, but the needs remain enormous.

Additional examples of the low capacity of human resources in Laos are highlighted throughout this Report, particularly in the discussions of implementing and supporting institutions. Even if significant political changes were to take place, or an influx of capital was obtained, the limitations in Laos' educational system and the literacy and capacity of its population will take at least a generation to improve. Measures are being attempted by the donor community to assist at all levels, but observers report that the country's rulers are not in any way committed to reforms that may result in more independent thinking or greater personal ambitiousness. Thus, all assistance directed at commercial legal and institutional and trade-related reforms must take place against a backdrop in which, in the words of one admittedly jaded foreigner, "The only priority of the people in power is staying in power. That is the beginning and end of their interest."

The urgent need for clarity and reliable information in Laos' CLIR and trade environment. As Laos takes very small and slow steps toward market-oriented reforms, even its own technocrats – conditioned, as they are, against risk-taking and criticizing the Government – observe that there is simply not enough clarity or access to information within their system. With respect to access to the type of very basic information that is required for domestic enterprises and foreign investors to understand the environment for doing businesses, the following points arose during the course of the Diagnostic:

- Although Laos' commercial laws are generally straightforward, clear, and accessible, the status of implementing decrees, ordinances, and regulations is murky at best, with the universe of this framework undefined and inaccessible even to the country's own Ministry of Justice. For example, the Office of the Prime Minister enacts as many as 10 decrees each year, many covering topics of interest to the commercial and trading community, such as distribution of goods, management of import and exports, pricing of goods, taxes, intellectual property, state investments, and so forth. No public hearing is required to enact an ordinance. The drafting of decrees is typically delegated to line ministries by the Prime Minister's Office. Although the Ministry of Justice plays a role in reviewing draft decrees and other regulations, it often does not receive a final copy.
- Courts are rarely informed of decrees, ordinances, and regulations that may affect the outcome of a dispute. Similarly, judges rarely access the decisions made by other

provincial courts or by the appellate courts and Supreme Court, even on matters entailing a similar set of facts.

- All court records are kept by hand in ledgers; court minutes are handwritten summaries taken by clerks; and case files are not centrally kept after the close of a case. Judgments, while technically “public,” are never published and are rarely available to anyone but the immediate parties to a dispute. Thus, even if the court does reach a satisfactory result, there is little way for businesses to learn or take comfort from the decision and thus, a negative image of the courts is perpetuated.
- The fact that companies are registered in a disjointed, multi-layered process involving State, provincial, district, and village bodies means that information pertaining to private companies is highly dispersed and difficult to access.
- Although Laos has a Secured Transactions Law, there is no central registry for secured transactions. Mortgages are registered at the land management office, while loans on vehicles are registered at the motor vehicle bureau. Although the Secured Transactions Law provides that “a Security Contract must be registered at the Registration Office of the Department of Finance,” there is no such office at this time.
- The media in Laos is not free. As summarized by one foreign observer, “You will never see anything remotely critical of the Government.” All reporters are employees of the Ministry of Information and Culture. Accordingly, critical analysis of the environment for commercial law or trade is generally not available, other than through the donor sector.

Not only are domestic enterprises and foreign investors essentially unable to access information about the ownership and viability of existing companies, or about whether movable property has been secured against a loan, but also they are fundamentally unable to understand *what the law in Laos actually is*. This dearth of information is a critical shortcoming, particularly as Laos endeavors to move toward WTO accession, at which point the country’s legal framework will be of enormous interest to insiders and outsiders alike.

The under-appreciation of SMEs in the Lao economy. Although certain acknowledgement has been granted by the Lao Government to small and medium-sized enterprises (SMEs) as a critical component of broad-based, sustainable economic development,⁴ numerous examples of official ambivalence or lack of understanding of the importance of SMEs prevail throughout the economy. For example, the dismal state of the business start-up process, as detailed in the Company Law chapter of this Report, illustrates the absence of appreciation for the needs of new businesses. Similarly, the fact that little effort has been made to create an implementing environment for the registration of secured transactions shows a lack of understanding of the

⁴ For example, a Decree on the Promotion and Development of Small and Medium Sized Enterprises was passed in April 2004. The Decree defines “small enterprises” as those having an average number of employees not exceeding 19 persons or total assets not exceeding 250 million kip, or an annual turnover not exceeding 400 million kip. Medium sized enterprises are those having an average number of employees not exceeding 99 persons or total assets not exceeding 1200 million kip, or an annual turnover not exceeding 1000 million kip. This Decree defines directions and policies and establishes an SME Promotion and Development Fund. The Decree covers access to finance, training of entrepreneurs, and setting-up new a regulatory and administration environment.

relationship between the ability to secure property against loans and the ability for businesses to grow. In the trade sector, as just one example, the lack of harmonization of data and forms necessary for completing Customs and the other border agencies' formalities means that the trade community must complete multiple forms with essentially the same information – a burden in particular for SMEs. Moreover, the fact that SMEs and the private sector generally are consulted only to a very limited degree over the formulation of new regulations and policies is further evidence of Government neglect of the SME community.

As discussed at various points in this report, the Lao Government has attached enormous value to large-scale projects, such as the Nam Theun 2 hydroelectric project, providing significant access to project managers and even revising the legal framework to accommodate the projects. Due to the individual importance of large investments (including their often huge taxpaying potential), these initiatives receive considerable attention and help from the Government in a way that SMEs and smaller foreign investors do not. The development and encouragement of SMEs is, in the long term, more important for the Lao business climate than individual “special” projects. Namely, SMEs can ultimately provide more jobs across a greater portion of the country than isolated electricity or mining concerns can. Several persons who were interviewed for this Diagnostic made this point and expressed the view that large projects are crowding out the Government's attention.

Strengthening the weakest link: regional initiatives and best practices. If Laos happened to be a land-locked, determinedly one-Party state situated in another region in the world – such as in Central Asia or Sub-Saharan Africa or parts of the Middle East – it might languish in its relative poverty, isolation, and official oppression for at least another generation. But, in the words of Laos' own promotional agencies, the country is a “land link” to some of the most dynamic and rapidly changing economies in the world. Despite its political tendencies against change, Laos is a full member of regional initiatives focused on trade, including the ASEAN Free Trade Agreement and the Greater Mekong Sub-region initiative. Laos is also part of the ASEAN-sponsored Vientiane Action Plan (2004-2010), a regional initiative geared “toward shared prosperity and destiny in an integrated, peaceful and caring ASEAN community.”

As more goods, services, people and money cross its borders, Laos will necessarily experience increased demand for private sector services, not the least from tourists who include Laos within their travels to the region. In addition, foreign investors seeking regional markets and suppliers may look for opportunities that will take root in more than one country, thus requiring greater harmonization of business-related practices and services, such as company registration, dispute resolution, and transport of goods. Moreover, initiatives in such areas as corruption, anti-money-laundering, protection of intellectual property, and other issues will only increase in regional importance.

As these changes occur, Laos will also confront along with its neighbors common questions of governance, freedom of expression, and rule of law. For example, along with Vietnam, Laos will necessarily face the question of whether and to what extent economic freedom is compatible with one-party governance. The democratic examples of Cambodia and Thailand, where public input into the law-making process is far more extensive than that found in Laos and Vietnam, will also be of interest and influence. As more money circulates through the Lao economy, the country

will face the scourge of official corruption that currently plagues Cambodia and Vietnam, and regional attempts to discuss and address the issue will become of enormous interest. Finally, Laos must join its neighbors in considering the true meaning of judicial independence in a region where understanding and commitment to such a value is, in general, lacking.

Thus, a key part of development in Laos will be the observation, integration and harmonization of regional agreements and best practice in all areas of commercial legal and institutional reform, and trade. Successful assistance projects will be mindful of this imperative.

II. Company Law and Corporate Governance

A. Introduction

Company Law is crucial in market economies; it sets the legal environment for the creation and operation of privately-owned businesses. *Good* Company Law is especially critical in transition-economy countries. It can encourage entrepreneurship by making it easy to start up and register a company; it can encourage businesses to come out of the underground economy into the publicly-registered taxpaying economy; and it can encourage new investment – and provide investor protection – by setting forth clear and objective rules for a company’s ongoing internal governance.⁵

In most countries the rules for starting up a new company are a small and simple part of the Company Law, while the rules for the company’s continuing operation and governance are vastly more important and more detailed. In Laos, however, the start-up process is lengthy and unpredictable – so much so that this can be considered the number one problem under the Lao Company Law. But start-up is not the only issue; the law also lacks many of the basic provisions for investor control and protection which are found in other Company Laws and which, increasingly, are needed to attract outside investment and meet international best practice.

Accordingly, the company start-up process in Laos should be completely revamped and streamlined. Beyond that, an all-new Lao Company Law is needed on other points. It is understood that such a new law is already being drafted and is at an advanced stage of review. Even if that draft contains a simplified registration process, however, work will remain considering how deeply entrenched the present company start-up system is.

B. Legal Framework

The current Company Law is the Decree on the Promulgation of the Business Law, No. 005/94 (“Company Law”), dated July 18, 1994. Regarding company start-up and registration, the Business Law has been supplemented by an undated “Notification on Procedure for Business Registration in Lao PDR” which is available on the Ministry of Commerce website.

Company start-up and registration. The present Company Law does not prescribe the process for forming a new company (a shortcoming in itself). That is a matter of largely-unwritten practice which has been developed in the many State, provincial and district bodies whose various types of approvals are required. What the Company Law does say is that establishment of a company requires application to all concerned government sectors and “shall be separately determined” by them, and that when an application is made to any particular sector it must “respond within 60 days from the date the application is received” (Article 16, paragraph 2). The Company Law also makes clear that a company “shall be considered as lawfully established only

⁵ A useful, widely used statement of governance principles for transition-economy countries (as distinguished from countries with developed capital markets such as the U.S., Western Europe, and Singapore or Japan) is contained in General Principles of Company Law for Transition Economies, published under the auspices of the OECD in 1999.

when properly registered as an enterprise” (Article 16 paragraph 3) – a point in time which often comes only *after* the prior approval of an uncertain number of governmental bodies.

The Company Law also lists eleven business sectors “which must be closely controlled by the State.” Interviews confirmed that new companies in those and other sectors – especially when foreign-owned – may get special and especially lengthy scrutiny before they can be registered. The eleven sectors are petroleum, electric power, water utilities, telecommunications, wood and wood products, mines and minerals, food, medicine, chemical substances, liquor, and tobacco (Article 13). On top of this, the Company Law also reserves authority to restrict foreign ownership of certain business sectors; it specifically states that “business sectors specifically reserved for Lao citizens shall be separately determined by the government” (Article 14). There is no published list of these sectors, but they reportedly include common trades such as barbers and masseurs and also include financial auditors, which require accounting firms to obtain special permits from the Government.

In practice, the company start-up process requires at least four separate approval procedures and in many cases several more. Interviewees stated that for a significant-sized business the process can take from 45 days to six months, with two to four months being perhaps typical. Cases were cited in which more than a year was required. The World Bank Doing Business in 2006 report gives a figure of 198 days to establish and register a business in Laos and ranks Laos 102nd out of 155 national economies in this respect.

The complexity of business start-up means that prospective investors must engage lawyers or “facilitators” (or both) to steer them through it. Such persons were interviewed and made it clear that personal contacts within the government are often a key to getting things done. Of course, such circumstances create a climate in which informal payments can be solicited and corruption can be an issue.

The basic four approval processes are:

- ***Approval of the investment.*** The agency which gives this approval is determined by the amount of the company’s proposed capital. If that is *US \$200,000 or less, but more than 300 million kip (about \$3,000)*, the approval is given by a provincial authority in the province in which the company is located. In Vientiane Capital Province, this is the Vientiane Capital Department for Domestic and Foreign Investors. For a company with capital *greater than \$200,000*, the approval is given by the State Committee for Planning and Investment’s Department for Promotion and Management of Domestic and Foreign Investment, whose jurisdiction covers the whole country. The approvals are required for both domestically-owned and foreign-owned companies. Both the provincial authority and the Committee have printed application forms for approval; these are quite detailed and they call for numerous other documents as attachments.⁶ Personnel at the Vientiane

⁶ The detail is considerable; it also appears that some of the detail called for may not be applicable or possible to provide in every case. The forms call for among other things the investment amount broken down by fixed vs. working capital, sources of any debt financing, details of equity ownership of the investing entity, information regarding proposed employees with a description of an employee training plan, a detailed investment plan, details of production or services and three-year projections of cash flow, profit, products and services (to include price and quantity of products and services) a list of

provincial investment approval office stated that after the application form and attachments are complete and properly submitted the approval takes only 3-5 days. The time required for completion, however, cannot be determined in advance. For domestic companies with capital *under 300 million kip*, no investment approval is required, but officials at a district registration office (where such smallest companies are registered – see below) report that their office has economic and financial police officers on its staff whose job is to monitor the assets of small companies through visits and review of their tax returns, and that if a company's assets go over 300 million kip it is then required to obtain investment approval from the provincial authority.

- ***Approval of concerned ministries.*** Several interviewees stated that this step can be the most lengthy and unpredictable part of the process. There is no standard form or procedure for these approvals; rather, each Ministry has its own rules and approach, and (it was said) the Ministries are not always consistent in their policies and do not always communicate with each other. It was also pointed out that a particular Ministry may disapprove a new investment even though the investment, as such, was approved by the appropriate investment agency.
- ***Registration of the company.*** This step takes place after the above investment and Ministry approvals have been obtained. (That at least is the practice; the Company Law itself does not require non-consecutive approval processes.) As with investment approval, the agency which gives this approval is determined by the amount of the company's capital. If it is *under 300 million kip* the registration is done with an authority in the district (a district being a subdivision of the province) in which the company is located and, as stated above, separate approval of the investment is not required. (In practice, many or most of the smallest companies never register.) If the capital is *more than 300 million kip but not more than \$200,000 U.S.*, the registration takes place in a provincial registry office. If it is *more than \$200,000 U.S.*, it is done with the Ministry of Commerce itself. Both the provincial registry and the Ministry of Commerce have detailed application forms which require attachment of the investment approval and considerable other detail.⁷
- ***Tax certificate.*** After a company is registered, a tax certificate must be obtained from the Ministry of Finance. The printed form for this step consists of 10 pages together with a longer attachment and with still other attachments required. Personnel at the tax certificate office produced some completed applications which were approximately one inch thick.

More approvals are often needed. Examples include specific permits for real estate and building erection, environmental permits, import privileges and tax incentives – for which the rules and timing are, again, unclear.

machinery and equipment, a marketing plan, sales targets for three years, a description of market, a schedule for determining location, construction start-up, opening and full operation, a CV of each investor, and a bank statement.

⁷ For example, one form requires personal detail and CVs for the investor(s), the statement of the value of company assets, both in kind and in cash, a power of attorney signed by four witnesses, a list of assets broken down by buildings, vehicles for production, vehicles for office, equipment for production, equipment for office, etc., and requires 12 attachments, to include the contract among shareholders, a permit from the central bank, an economic analysis of the business and the investment approval.

The burden of this multi-step process is increased by the fact that these approvals are applied for and obtained consecutively. That is, they may not be sought at the same time. Thus, the investment approval is obtained before the Ministerial approvals can be applied for; those are obtained before registration can be applied for, and so forth. Indeed, the form for application for registration requires that the investment license be included as an attachment. (This “consecutive-not-simultaneous” rule does not appear to be stated in any law but it is clearly the practice.) Only when this entire process is completed is the company fully registered and authorized to conduct its business. This can cause hardship that only discourages investment. Many starting businesses must rent space, buy equipment, hire employees, and engage in other activities before the overall approval process is completed.

Attention has been given to this issue by one donor in particular, the Lao-German Technical Cooperation project of the Deutsche Gesellschaft fuer Technische Zusammenarbeit (GTZ). GTZ has proposed a “one-stop-shop” system to the Lao Government in which all permits could be sought concurrently and coordinated and possibly granted by a single agency. Such a system, successfully implemented, could do much to deal with these problems.

Other pluses and minuses of the Company Law. Putting aside start-up issues, the present Company Law seems adequate under conditions as they have been to date. In form, the law follows the Company Law provisions of the French Commercial Code, although much abridged and also with much added State involvement. For future national economic growth, however, a more sophisticated and modern replacement will be needed. Provisions should be added for corporate governance and investor protection in companies with wide public shareholding (of which there are now none in Laos). Now-missing elements which a replacement law should contain include the following:

- A statement of the duties of directors and managers to shareholder/investors (including restrictions on conflict of interest transactions);
- Details regarding issuance and types of stock (so that, for example, a future company could have common and preferred stock and possibly such things as options and warrants for financing transactions);
- Greater detail regarding shareholder and director meetings and actions (covering, for example, notice of meetings, agenda rules, proxy restrictions and rules for voting); and
- Detail found in other laws on matters such as mergers, major asset sales or purchases, dissolution and other major company actions.

In fact, the Ministry of Commerce is already working on a new Company Law with the assistance of foreign experts and donors, including the Japanese Legal and Judicial Development Project in Laos (JICA). It is understood that at least one draft has been circulated for comment (although a copy was not available), which, after further revisions, reportedly may be ready for enactment later in 2006.

Profile of Lao companies. A profile of all companies organized under the Lao Company Law is instructive toward understanding the country’s private sector environment. The Company Law provides for four forms of companies which may be privately owned:

- Sole proprietor;
- General partnership (in which the partners are personally liable for the partnership's obligations);
- Limited liability company (in which the shareholders are not personally liable except to the extent of any unpaid share subscriptions, which may not have more than 20 shareholders, and whose shares are not freely transferable); and
- Public company (in which, also, the shareholders are not personally liable but which has more detailed and formal governance rules than a limited liability company and whose shares may be publicly offered).

In addition, the Lao Company Law covers two more forms:

- State-Owned Enterprises, including those with minority private-ownership participation; and
- Collective enterprises (defined as informal organizations of farmers, traders or small craftsmen).

There are currently no public companies in Laos and thus there are no companies with widely held investor ownership.

The very largest Lao-incorporated companies happen to be closely-held, majority foreign-owned companies, co-owned with Lao State participation. An example is the Nam Theun 2 Power Company, which is developing the NP2 hydroelectric project with World Bank support and anticipated investment of about \$1,500,000,000 and whose equity owners are Electricite de France, two Thai companies and a Lao State-owned holding company. Another example is the Oxiana mining project owned by Australian investors with Lao State participation.

Companies such as these, while organized under the Lao Company Law, are not dependent on it for their governance rules or their investors' protection. Rather, they have highly negotiated shareholder agreements which cover what they believe they need and their corporate structures and documents are individually reviewed and approved by the State on a custom basis.

As would be expected, the overwhelming majority of Lao companies are small, domestically-owned businesses in the commerce, service and agriculture sectors. This is shown in the following chart:

	Total Number of Companies Registered	Number Wholly or Partly State-Owned	Number Wholly Privately Lao-Owned	Number Wholly or Partly Foreign-Owned
Total	62,158	179	61,129	850
Registered with Ministry of Commerce (capital over \$200,000)	1,970	97	1,083	790
Registered with Provincial Office (capital between \$200,000 and about \$3,000)	16,489	78	16,353	58
Registered with District Office (capital under about \$3,000)	43,699	4	43,693	2

C. Implementing Institutions

Ministry of Commerce. The Ministry of Commerce is the primary regulator of the Company Law. Its officials are aware of the issues and views described above and its personnel were helpful and communicative on its procedures and processes. The Ministry is the body primarily undertaking the drafting of the new Company Law. It also has a user-friendly website which could be expanded. On the other hand, the jurisdiction and authority of the Ministry of Justice are severely limited and its own procedures can be slow and its forms are complex. It does not register all companies (most are registered at the provincial and district level); it registers a company only after other State bodies have approved, which makes its registration authority (as complex and discretionary as it is) only secondary; and it has no other evident regulatory authority.

Investment approval bodies. These are the State Committee for Planning and Investment and, for smaller companies, the various provincial investment approval authorities. The Committee on Planning and Investment is genuinely supportive of foreign investment, which is a strong plus for future Lao development. Again, however, the authority of these bodies is divided and limited since various Ministries and other agencies might veto an investment notwithstanding these bodies' approval.

Other approval bodies. As described above, other Ministries and other bodies have approval power over formation of a new business. Their rules vary and it is said that their approaches can be inconsistent and that they often do not communicate.

Tax office. Procedures for tax registration are described above. A certain amount of complexity in the tax registration process is justified to ensure that taxes are not evaded. However, the

complicated and discretionary administration of tax compliance has been said to encourage private negotiation and informal payments and to be a disincentive for businesses to report accurate financial information.

D. Supporting Institutions

Lao National Chamber of Commerce and Industry. The Chamber of Commerce views itself as an advocacy body for private businesses. For example, the Chamber provided comments to the Ministry of Commerce on the draft new Company Law. The Chamber's members include both foreign and domestically owned businesses and comprise about 10% of all privately owned companies in Laos. Its personnel advise members generally on the process of new company formation and its officials shared with us the views expressed above on the length and complexity of the company registration process. The Chamber has a staff of about 25 persons but suffers from inadequate funding for its overall objectives; it is funded by member dues of about \$20 per year which it has not been able to increase. It was formerly a part of the Ministry of Commerce but is now a free-standing, quasi-Governmental unit.

Private lawyers, accountants and other professionals. Lawyers and other professionals including “facilitators” are necessary and helpful for advice on company registration and corporate governance.

Courts. The courts are the ultimate recourse for resolution of company disputes. In general, however, the courts are viewed as slow to decide, lacking in corporate expertise and thus, as a practical matter, not very useful.

E. Social Dynamics

There is both a need and a strong desire (a “market”) for simple, objective and quick company start-up procedures. Steps listed in the recommendations below will help toward that end.

The new Company Law can help by mandating such a procedure and also a one-stop-shop system for all required permits – investment, Ministry, company registration, tax, and others.

Given the complexity and the large number of governmental players in the present system, however, only a major re-do of the laws and entrenched practices would accomplish this objective. There does not appear to be either the sense of urgency or the political will required for such a task.

F. Recommendations

The following recommendations are made:

- Completely revise the company start-up process to make it simple, objective and quick. Specifically:
 - State *all* the requirements for company formation *in one place* in the new Company Law. State them objectively so that there is no room for discretion or

- “interpretation.” As just one example, list all the requirements for a company’s articles (contract) of incorporation.
- Make the registry’s role ministerial, not discretionary. State that if the listed requirements are met, the registry *must* register the company within one day.
 - Simplify all of the forms. Also have the same form for all companies – not separate forms for State offices vs. Provincial offices.
 - State in the new Company Law that approval processes may be carried out simultaneously.
 - Permit registration of a company before other approvals are obtained, so that a business can conduct start-up operations while some approvals are still pending.
 - Consider establishing a “one-stop shop” system as many other countries have done. In this system one single Government body coordinates (and may issue) all necessary approvals following a uniform and consistent policy.
- Expand the Ministry of Commerce website to:
 - Set forth the above new procedures and policies.
 - Set forth the text of the Company Law, all forms and all Ministry announcements and regulations.
 - Provide statistics on companies such as those shown in the chart above in this chapter.
 - Publish and circulate the draft new Company Law for public comment and hold comment workshops with interested groups including the Chamber of Commerce, Bar Association, foreign investors, donors and others.
 - Establish training programs for State, Provincial, and District staff on the simplified system for company formation.

III. Contract Law and Enforcement

A. Introduction

Laos is still very far from having a modern system of commercial contracts. The Contract Law is outdated and overdue for a rewrite. There is not a strong tradition of written contracts; indeed, outside of the cities, written contracts or leases are the exception rather than the rule.⁸ Many contracts are written by non-lawyers. Even when lawyers do draft contracts, the resulting documents are often of low quality. Except among foreign investors and large enterprises, contract negotiation and drafting are not given a high priority. The implementing institutions are weak. Contract enforcement is slow and unreliable.

On the other hand, written contracts are becoming more common and widely accepted. Among businesses, at least, contract negotiation is an accepted practice. Lawyers are gradually becoming more adept at writing contracts. Various sorts of form contracts are coming into use. In addition, both written and oral contracts benefit from several mechanisms of non-judicial dispute resolution.

B. Legal Framework

The basis for commercial contract law in Laos is the 1990 Contract Law (PL No. 41/PO, passed July 27, 1990). The date is worth noting, because the law was passed while Laos was only just beginning its transition to a market economy. This is reflected in the text. The law incorporates some modern and liberal legal concepts, appropriate to a market economy; some socialist legal concepts, such as equality of benefit and formal limitations on interest; and some that are appropriate to a developing economy, such as possessory pledges.⁹

On the positive side, the Contract Law recognizes the principle of freedom of contract. In theory, any competent person can make any kind of contract, as long as it is not contrary to law or public policy. All actors – individuals, enterprises, collectives, and State agencies – are legally equal. The law allows a variety of types of contract, including leases, sale-purchase contracts, rental contracts, bailments, and contracts for the assignment of obligations.

The law cannot, however, be considered a modern contract law. It is short – just 27 pages in translation – and sketchy. It completely lacks a definition section, and none of the key terms of art are defined in other laws.¹⁰ There are whole areas of law that are neglected. There is no

⁸ Laos' rural literacy rate is only about 55%. Even in the cities, it is very common to find labor contracts signed with a thumbprint.

⁹ Possessory pledges require the borrower to leave something of value as security with the lender. In the West, the classic example would be a pawnshop. In commercial transactions in modern economies, possessory pledges have almost entirely been superseded by non-possessory pledges. In developing countries, however, possessory pledges are often the only way most of the population can get access to credit. The Contract Law devotes four articles (25-28) to possessory pledges, and barely mentions non-possessory pledges at all (Article 29).

¹⁰ In fact, it is striking how few other Laotian laws deal with contracts. The Property Law, for instance, barely mentions property contracts; the Foreign Investment Law says nothing about investment contracts; the Civil Procedure Code is devoted entirely to court procedure without a word about contract formalities or formation. This is rather odd. It is normal to have a Contract Law, but it is quite unusual to have all law pertaining to contracts confined to a single law.

discussion of agency. There are no provisions for specialized contracts such as installment-purchase, franchise, or insurance contracts. There is no discussion of financing beyond simple loans; many financial mechanisms that would be useful to Laotian businesses – warehouse receipts, finance leasing, and factoring – are not contemplated. The mechanisms of contract formation are unclear. There is no differentiation between commercial and consumer contracts. There is hardly any discussion of remedies other than rescission. Specific performance does not exist. Damages are mentioned (Article 36 and elsewhere) but no means of assessing or limiting damages is given.¹¹ Penalties can be applied without limit (Article 31), which is not consistent with international best practice.

Furthermore, the law contains some provisions that seem to be troublesome holdovers from the socialist period. Article 6 allows a court to rescind or void a contract if there is not “equality of benefit” between the parties:

[The parties] shall not be deemed to have made the contract voluntarily if either party enters into a contract out of mistake, fraud, threats, or violence, or [if the contract] is not beneficial to one of the parties...

A contract shall be deemed to be not beneficial to one party when the benefits arising from that contract are unequal as between the contracting parties.

Since “unequal” and “benefits” are not defined, the court can simply declare that a contract does not benefit the parties equally.

This is more than a technical problem. Lao courts have used this section on numerous occasions to void contracts. One interview subject, a businessman, reported losing a contract case because of this; he believed that the judge had in fact been bribed, and simply used the “unequal benefits” article as an excuse. Whether true or not, there is a perception that courts can throw out contracts at will, and Article 6 seems to be part of the reason.

Another troublesome provision is Article 17.3: “In the case where a contract is made which conflicts with the interests of the State or society, all applied assets shall be confiscated in their entirety.” Although this provision is rarely invoked, an article with such broad, vague, and punitive language does not belong in a modern contract law.

Another problem is that the Law sets forth limitations on interest. Article 46 states:

When borrowing money from [persons] other than banks, computation of interest can exceed [the interest charged on] bank [loans], but by no more than three percent annually.

¹¹ Many laws contain provisions stating that contract damages are limited to injuries that are a direct result of the breach, or that were foreseeable at the time of the contract. It is not clear whether the law would allow contracting parties to limit or exclude consequential damages. This is significant, because damage limitation clauses are quite common in modern commercial contracts.

In lending money, it is prohibited to include interest in the principal and interest cannot exceed principal.

When repayment is due as stipulated in the contract, if a lender refuses to accept money or assets from the borrower, there shall be no further calculation of interest.

The first paragraph presumably applies to moneylenders, who are a common source of capital for individuals and small businesses. It also applies, presumably, to other sorts of non-bank finance – microfinance, finance leases – and also to interest on contractual debts. The second paragraph would seem to prohibit compound interest.¹² And the third paragraph means that acceleration of payments must always be permitted, on penalty of losing all subsequent interest. All of these conditions are potentially troublesome, and do not belong in a contract law.

Finally, the law has a variety of definitional problems. For instance, it raises a confusing distinction between “civil contracts” and “business” or “commercial” contracts. This distinction has no force in the Contract Law; it appears to be there for use in other laws, but it does not seem to have been so used. The language describing who can create contracts is also confusing: Article 2 refers to “State and collective organizations,” but does not make it clear that the State itself (i.e., Ministries and Agencies) can enter into contracts. Moreover, Article 4 states that contracts can be made by “one, two, or multiple parties,” yet the rest of the law refers only to bilateral contracts. Unilateral contracts and third party beneficiaries are simply not mentioned.

Laos is not a member of the UN Convention on the International Sale of Goods, and the government does not appear to consider this matter to be urgent.

C. Implementing Institutions

Publication of laws. The Contract Law has been published as a pamphlet. Most lawyers have it, and most large or sophisticated commercial actors have access to it. English and French translations exist and are not hard to find. Although some Laotian laws are available online, the Contract Law is not.

Publication of decisions. Case decisions by courts cannot currently function as a source of law on contracts (or anything else). As a socialist civil law system, Laotian courts take the position that judges interpret statutes rather than make law. More to the point, courts do not publish decisions. In fact, courts do not always file or record decisions.

Court decisions are often communicated to the parties only in the form of a court order, without reasoning or explanation. When there is a written decision, it is often quite brief – just a short description of the facts of the case, a citation to the relevant statutes, and a verdict. Decisions are usually not made available to anyone other than the parties to the case, and they are not consistently recorded at the court itself. Court decisions – even Supreme Court decisions – are

¹² In practice, this provision seems to be ignored by banks and moneylenders alike.

rarely publicized, and never published. Records of past decisions are not considered public information.¹³

Courts. Interviewees did not express a high degree of confidence in the Lao courts. Most interviewees specifically said that they would avoid the courts if at all possible.

This sentiment should, however, be placed in a regional context. While the courts in Laos are perceived as slow and not very competent, they are not perceived as irremediably corrupt. When interviewees said that they would avoid the courts, they usually gave time, expense, and uncertainty as their reasons, rather than corruption per se. This situation contrasts to Vietnam and (especially) Cambodia, where corruption is almost always mentioned at once.

Reluctance to use the courts can be explained, in part, by risk avoidance. There is a fear that the judge will not be competent, or that the court will take a highly formalist view of a contract transaction and invalidate it, instead of working to solve the commercial dispute. Court decisions are seen as unpredictable, even for similar facts and circumstances. Trust in the courts' discretion in contract disputes is low because users evaluate the courts as "not ready" to handle commercial contracts. There is universal agreement that the courts are simply too slow.

Both Lao and foreign actors report that the courts struggle with commercial contract cases. Results are mixed: one foreign investor lost a case that it is certain it should have won, while another says that it got a favorable result, albeit very slowly. Most interviewees, both Lao and foreign, expressed concern about the inefficiency of the courts, the speed of courts, and the inability of courts to resolve complex contractual disputes. In general, the courts are not established and operating effectively with respect to resolving commercial contract disputes.

Furthermore, enforcement of judgments is a serious problem. Enforcement is done, not by the individual courts, but by a separate Enforcement Agency within the Ministry of Justice. Information flows slowly between the courts and the Agency. The courts have no institutional incentive to ensure that judgments are enforced, while those charged with enforcement do not want to overreach their authority. When a judgment is enforced against property, there is no system of auctions; the creditor simply sells the property, subject to court approval. This means that enforcement, even when it occurs, is unlikely to leave the parties satisfied.

A Commercial Chamber was set up within the court system in 2002. It has authority over commercial cases, which are somewhat vaguely defined. So far, the Chamber has not been very active – in Vientiane, for example, it handles about five trials per month.

In a contract context, there is a broad perception that courts are more sympathetic to debtors than to creditors.

¹³ It should be noted that this is not because Laos is socialist, nor either because it is a civil law country. Most civil law countries keep public records of decisions, even if they do not recognize them as binding precedent. Vietnam is a socialist civil law country, but Vietnamese courts keep records, and Vietnam began to publish Supreme Court decisions in 2005. Laos' lack of recording and publication seems to arise from a combination of past habits of secrecy, limited court resources, and the generally low status of the courts.

For further discussion of the court system, see this Report's chapter on Commercial Dispute Resolution.

Arbitration. The Contract Law makes arbitration mandatory for certain types of disputes. Specifically, Article 34 states the following:

“If [a] dispute is an economic dispute between organisations, or between organisations, economic units and foreign parties, the organisation [responsible for] economic arbitration shall settle such disputes.”

This provision does not seem to be generally enforced. This may be because the law does not clearly define either “organization” or “economic unit,” or it may be because “the organization responsible for economic arbitration” – the Economic Arbitration Board – has very limited capacity.

The Economic Arbitration Board is an office within the Ministry of Justice; it is charged with resolving commercial disputes between both domestic and foreign parties. For discussion of the Board, see this Report's chapter on Commercial Dispute Resolution.

Village leaders. Laos has an institution that seems to be unique in the region: the village leader.¹⁴ Villages elect these leaders in a semi-democratic fashion, choosing from a slate of candidates selected by the Communist Party. Village leaders are usually, but not always, Party members. They serve for renewable two-year terms. They are found not only in villages, but also in urban areas, where the “village” consists of a particular neighborhood of the city.

Village leaders are roughly equivalent to mayors, but they also have an important judicial function. Namely, they serve as the de facto court of first instance for disputes between individuals in the village. Although villagers are not formally required to take their disputes to the village leader, many of them do. In effect, the leaders serve as small claims courts (and family and juvenile courts as well).

Village leaders do not have formal legal training, but both the leaders interviewed showed a basic familiarity with the Contract Law.

There does not seem to be a fixed limit on what sorts of cases a village leader may consider. Clearly they can exercise jurisdiction over land and property disputes between individuals native to the village, and between service and purchase contracts within the village. They avoid disputes involving foreigners, State-owned enterprises, or very large sums of money.

A village leader's handling of an issue is in the nature of mediation, or, when the parties cannot come to a resolution themselves, an arbitration. The result can be appealed, either to a district council (the next administrative level) or in a court. In practice, however, most decisions are accepted by the parties, and lead to a resolution. This may be partly because of tradition, partly because there is a political aspect, and partly because dispute resolution before the village leader

¹⁴ The “Commune Councils” of Cambodia sometimes serve a similar quasi-judicial function, but they are councils rather than individuals, and seem to get much less use.

is much faster and cheaper than going to court – so much so, that even an adverse decision may be preferable to a court case. Most commercial disputes are resolved within days. Complex disputes might take up to three months, according to the village leaders interviewed, but even this is generally faster than the court system.

Interviews showed that the decisions of village leaders are afforded a high degree of legitimacy. There may, of course, have been a selection effect at work here. Persons not willing to abide by the village leader's decision, or fearing bias or incompetence, would probably seek out other means of dispute resolution. Nevertheless, it is clear the village leaders are an important institution for resolving small commercial disputes.

D. Supporting Institutions

Notaries. As in other civil law systems, notarization of contract documents is common, both for evidentiary reasons should a dispute arise later, and as a precautionary check that the documents and the transaction are legally compliant. Commonly notarized documents include mortgages, property transfers, and civil agreements such as wills.

Unlike most civil law countries, Laos does not have individual notaries. Instead, there are notary *offices*, which are part of the Ministry of Justice. To notarize a document, contracting parties go to the local notary office, which is usually located at the courthouse. Offices are established by geography; there are two in Vientiane and one in each provincial capital.

The system is quite new. The Law on Notaries was passed in 1990, but the first notary office did not open until 2002. Nationwide coverage was only achieved in December 2005, when the last two provinces opened notary offices. Even so, much of the population does not have easy access to notaries; small towns and mountain villages may be hours or days away from their provincial capital. The Ministry plans a gradual further expansion, until there is a notary office in every large town.

Notary offices are supposed to review the legal document for compliance with laws and ordinances. They may also provide basic legal advice to clients. There is no discussion of privatization or quasi-privatization of notaries.

Interviewees were divided on the usefulness of the notary system. Several said that notaries were not very useful. Although charges are low, notarizing a document is an additional expense in both time and money.¹⁵ Some interviewees said that notaries provide no value for this additional cost. One added that some actors are reluctant to have documents notarized, because the notary office is in the court building, and was associated with courts, police, and government attention. The Notary Department acknowledges that its staff is inexperienced and needs training.

On the other hand, notarization has probably caused a rise in the standard of contract drafting. (Many contracts are written by non-lawyers.) Several actors said that notaries add value, and that

¹⁵ Fees for contracts are on a sliding scale, from 1% for small contracts down to 0.1% for larger ones. Fees are capped at 1.5 million kip. Most contracts are notarized the same day, but long and complex contracts may take up to three days.

they are content to have their contracts notarized. Notaries have also been seconded to help bailiffs in enforcement actions.

Bailiffs. Bailiffs exist, and work for the Enforcement Agency of the Ministry of Justice. In theory, they have sufficient authority to enforce judicial decisions as prescribed in related court decision. In practice, however, all actors report that bailiffs are slow at the best of times, and often simply cannot or will not seize assets.

Chronic problems include a lack of competent staff; a limited knowledge of the law within the agency's legal staff; a lack of funding for provincial offices and district units; a lack of understanding of the execution process among other State officials, including court clerks, police, and prosecutors; and fear of political or social penalties for over-hasty action. The Agency also reports occasional problems with decisions that cannot be executed; intervention from a third party; and multiple applications for attachment or confiscation relating to the same property.

It is not unheard of for the Enforcement Agency to try referring a case back to the courts. When it does act, it is usually in cooperation with police or other enforcement agencies. This might seem to make enforcement more effective. In fact, the opposite is often the case. Coordination with the police takes time. The more time that passes, the more opportunity there is for assets to be moved away, sold, or otherwise put out of the reach of execution.

The Enforcement Agency acknowledges a massive backlog. At least 20,000 judgments remain un-enforced in Laos. Given the relatively small number of court decisions, this is probably a significant proportion of all the court judgments of the last few years. The Ministry of Justice acknowledges that "perhaps 20%" of judgments are enforced within a year.¹⁶

The Enforcement Agency conducted a one-day training program in cooperation with the United States Embassy following the enactment of the Law on Execution in 2004. The Agency does not seem to have received any additional support since then, either from the U.S. or from other donors.

Lawyers and legal professional associations. There is a Bar Association, but it is quite small. Oddly, it seems to consist mostly of older lawyers, including a majority who practiced law before the 1975 Revolution. It came into existence in 2002, and so far has only 69 members. Almost all of its members live and practice in Vientiane, and there do not seem to be local chapters outside the capital.

The Bar Association has made comments on laws, but does not have much capacity for either legal analysis or lobbying. It does not appear to be a major stakeholder in legal reform.

Law schools. Laos' single law faculty is not doing a very good job of training young lawyers to draft, negotiate, or litigate contracts. See the chapter on Commercial Dispute Resolution for more discussion of the law school.

¹⁶ Interview at the Ministry, 2003 figure. More recent figures are not available.

Media. All media in Laos are State-controlled. There is very little media coverage of contract disputes or litigated cases, except in cases where the government wishes to make a political point.

Despite this, there is an atmosphere of open discussion of non-political issues in commercial law and business disputes among the small group of professionals and stakeholders who deal with such matters. The media acknowledge a continuing need for reform both of laws and institutions. Non-political criticism of laws and policies is permitted, though it rarely finds its way into the media.

E. Social Dynamics

Contract informalism. Though estimates vary, it is clear that much of Laos' economic activity remains informal. This is also true of contracts. Much business in Laos remains primarily relational. Oral contracts and "handshake deals" are common; outside the cities, they are the norm.

There are several reasons for this:

- Weakness of courts and other supporting institutions. Creditworthiness, for example, has to be established by reputation or by personal observation.
- The stratified nature of the Lao economy. Current World Bank research shows that SMEs tend to do business together. The same is true for SOEs and foreign invested enterprises, with minimal sectoral cross-over.
- The predominance of family-owned and sole proprietorship businesses in the SME sector.
- A desire to leave a minimal paper trail, and/or to avoid government scrutiny.

Research from other transition economies suggests that formal drafting, best-practice formats and the use of contracts for risk management and dispute resolution purposes occurs when

1. transaction partners become more distant;
2. when the content of the transaction becomes complex;
3. when intangibles such as IPR are involved; and
4. where the value of the transaction increases.

Laos appears to fit this pattern. Given the state of the Lao economy, partners are often close, and transactions tend to be simple and to deal with tangibles. Thus, it is not surprising that formal contracts are still the exception and not the norm.

Written contracts are gradually becoming more common, but this is a slow process. Form contracts are used in a few contexts (such as labor contracts and mortgages) but are still rare.

Formal but unwritten contracts. Laos' Chinese minority has a traditional system of contract formation and enforcement. Verbal contracts can be made in front of a witness and sealed either

with an advance payment or a single piece of paper marked with a Chinese character. Enforcement is entirely social: it consists chiefly of ostracism. Dispute resolution seems to be done by consensus.

The system is almost entirely unwritten, but it cannot be called “informal”; everyone knows the rules, and they are generally followed. It is worth noting because, as elsewhere in Southeast Asia, the Chinese minority is disproportionately concentrated in business and trade.¹⁷

Written contracts not drafted by lawyers. A surprising number of commercial contracts are drafted by the actors themselves, not by lawyers. For instance, one garment factory casually mentioned that it wrote all its own contracts, including labor and supply contracts. This is partly because Laos has few lawyers, but it may also be because of a cultural or social preference for simple and quick contracts – even at a cost in precision, predictability, and security. Except when dealing with foreign investors, lengthy and detailed contracts are rare.

On the other hand, experienced businessmen do take contract drafting seriously. In general, they know the law and will negotiate hard on particular clauses such as liability, penalties, delivery and payment.

Labor contracts. Laotian labor law requires written labor contracts for all non-agricultural workers. Though not always followed, this law has encouraged awareness of contracts and contract issues among employers and businessmen. (It is not clear to what extent this is true among the workers themselves.)

Lawyers not traditionally important. Laos does not have a strong tradition of using lawyers, either for negotiating contracts or for resolving disputes.

There is not a requirement that parties to a commercial dispute be represented by a lawyer. In fact, only about 40% of parties appearing before the commercial chambers are represented by counsel. This figure represents an increase over previous years, however, when appearing without representation, or with representation by a non-lawyer, was the norm. The use of lawyers, both for contract drafting and for contract dispute resolution, seems to be slowly on the rise.

That said, the legal profession is not particularly respected or popular. There is not a perception that lawyers are important, and their status is not high. Private lawyers have only been allowed since 1989, and law firms only since 1996. There are fewer than ten law firms in the entire country, none with more than five lawyers. With few exceptions, private lawyers do not make much money.

¹⁷ The Chinese minority in Laos has been present since French colonial times, and has intermarried and mingled with ethnic Lao. It is quite small – probably less than 20,000 people – as many of the Chinese left after the 1975 revolution. These Chinese Laotians should not be confused with the Chinese of modern China, who have their own set of commercial traditions.

F. Recommendations

In light of the above, this Report makes the following Recommendations: .

- Laos needs a new Contract Law. The current law is simply not suitable for a modern market economy. There is abundant donor interest in legal reform, and the Ministry of Commerce is cautiously receptive to donor initiatives. It should not be difficult to get agreement on drafting a new law.
- With the interesting exception of the Chamber of Commerce and Industry,¹⁸ there is little stakeholder input into the drafting and development of new commercial laws. A new Contract Law would provide an opportunity to change this. Contract law affects almost everyone, so it would be possible to bring a variety of motivated stakeholders into the process.
- The Enforcement Agency desperately needs help. Until judgments can be enforced, the court system will continue to be weak and avoided. Some of the Office's problems (staffing, funding) cannot easily be reached by donors, but others (training, administration) can.
- The notaries also need training and assistance. Laos' system of notary offices is unusual, if not unique, but notaries can serve important functions (fraud prevention, basic legal advice) in a civil law system. In the long term, the government might also be asked to consider moving from the centralized notary office system to a more typical system of semi-privatized notaries, as seen in Indonesia and Vietnam.
- Judges in the Commercial Chamber need to be better trained – in business law generally, and in Contract Law in particular.

¹⁸ For more discussion of the Chamber, see this Report's chapter on Flows of Goods and Services.

IV. Real Property Law

A. Introduction

Real property law is crucial in market economies; it provides the legal environment for a business to own, use and sell land and buildings as well as to use them as collateral to obtain credit. *Good* property law is especially critical in transition-economy countries. A good law enables entrepreneurs to acquire land freely to produce goods and services in a secure ownership environment, which is a necessity for the long term. A good property law must also be accompanied by an objective, standardized titling system.

Under Laos' Constitution (Article 17), all land is permanently owned by the State, which would seem highly uncondusive to any free market in land transactions. Further, Laos has never had a reliable, standardized system of land survey and titling.

Under recently-enacted land laws, however, Lao citizens may hold rights to *use* land which are quite similar to ownership rights in the West. In addition, there are several means by which foreign persons can share in those rights through leasing, holding of beneficial ownership, acquisition of Government concessions and other devices. Also, a comprehensive ongoing survey and titling project is now in process with donor help which in several more years should cover much of the significant commercially desirable land in Laos.

Thus, as a practical matter, there is a relatively active market in land transactions and there is some de facto foreign "ownership." Both are more constrained and not as secure as they would be in market-economy countries and as they should be for optimal future economic development in Laos.

B. Legal Framework

The underlying legal framework for real property in Laos is the 2003 Law on Land, National Assembly No. 04/NA, dated 21 October 2003 (hereinafter the "Land Law"), as supplemented by the 2005 Decree on the Implementation of the Law on Land, Prime Minister's Office No. 101/PM, dated 20 April 2005 (hereinafter the "Implementing Decree").

These replaced entirely a former land law, the 1997 Law on Land, National Assembly No. 01/97/NA, dated 12 April 1997.

State ownership and extensive State regulation. The State's ownership of all land is decreed in the Constitution and again at the very beginning of the Land Law (Article 3).

The Land Law, the Implementing Decree, and all of the persons interviewed made it clear that governmental regulation is extensive, multi-layered, and heavy. A person's actual commercial use of the land that he or she holds is subject to numerous approval processes at the State, provincial, district and village levels, which are not always transparent or predictable.

Indeed, the overriding assumption of State control is encompassed throughout both the Land Law and the Implementing Decree, which describe Government regulation in the most sweeping yet imprecise terms. The Land Law states that the State land management authorities have authority over land use in 12 named subject areas including the grant and revocation of land use, lease and concession rights; the establishment of land use plans at local, regional and national levels; the issuance of policy on sale and purchase of land use rights; and the resolution of land disputes (Article 10). On top of this, the Land Law entrusts the “sectoral management” of land use to five named Ministries, each covering its own sector (and each operating separately from the national land management authority). On top of *that*, authorities at the province, district, city and village levels are charged with land management (including industrial and construction land) at their respective levels (see Land Law Articles 8-14 and Implementing Decree Articles 5-8).

With respect specifically to industrial land, the Ministry of Industry and Handicraft is charged with its management, development, and use. Persons using industrial land must receive authorization from that Ministry and from the relevant urban planning agency.

Private landholding. In fact, there is extensive private use and quasi-ownership of land by both Lao citizens and foreigners, both for residential and commercial purposes.

Landholding by Lao citizens. Lao citizens have the greatest and most direct rights, which in the Land Law are called “land use rights.” These are comparable in many respects to ownership in the West; they include the right to possess, use, lease as either lessor or lessee, sell, exchange, mortgage, and transfer by inheritance to close relatives. This is all stated very clearly in the Land Law (Articles 52-58) and was confirmed by all who were interviewed on this subject.

These rights are not absolute, however. The Land Law states that the rights will be lost if the land is used “inconsistently with the purposes” for which it was allocated by the State or otherwise than provided in the contract and in the Land Law, by court decision, by nonpayment of land tax for three years after warning, or by land appropriation by the State for public interest use. Some (or all) of these triggers for loss of rights are obviously subjective and open to unpredictable or politically driven interpretation. Nevertheless, it was stated that as a practical matter Lao persons generally feel – and in fact are – secure in their “ownership” rights, at least when their rights are not in conflict with rights that the State wishes to assert.

Landholding by foreigners. For foreigners the situation is more complicated. The Land Law’s basic rule on foreigners’ land rights is worth quoting because the language emphasizes the State’s control and discretion – the rule is that foreigners and resident aliens “who legally conduct their livelihood, invest and perform their activities in Laos are able to lease or concede land with the State,” with “authorization from the administrative authorities of the province and city where the land is located” (Article 64). Having laid down this rule, the Land Law lists eight allowed categories of land holding by foreigners, then specifies the rights of foreigners who qualify for the holding, and then lists obligations which foreigners must meet in their holding of land (presumably under implicit threat of losing their rights if they do not comply). The categories and some details specified for each in the law are:

- Lease of developed land from a Lao citizen – 20 years maximum;

- Lease from the State to a foreigner who invests in Laos– 30 years maximum;
- Lease or concession in specific and special zones – 75 years maximum with National Assembly approval required for any extension;
- Lease or concession of more than 10,000 hectares – National Assembly approval required in every case; and
- Lease to foreign embassies – 99 years maximum.

These term periods are maximums and are subject to renewal. In each case, however, the “determination of the actual term of lease or concession shall be based on the feature, size and conditions of each activity” (Article 65).

The Land Law goes on to state that the rights of qualifying foreigners include the right to sell (*but* with a prior State right to purchase), and the rights to mortgage or pledge as collateral, to sublease, and to use in investment with another person (*but* in that case “prior approval of the State shall be needed”) (Article 66).

How do most foreign-owned businesses hold land? The most common device for securing land on which to conduct business is to enter into a lease with Lao citizens or the State. Giving some comfort on this point, the Implementing Decree (which was prepared with foreign donor input) specifically refers to leases to foreigners and states that a lessee’s rights will be governed by the lease agreement. It further states (again emphasizing the ubiquity of State regulation) that land use under a lease “shall be subjected to the control of the concerned authority” (Article 19).

Another method is to place the legal title in the name of a trusted Lao citizen to hold for the benefit of himself and the foreign holder. This, however, requires personal trust and a relationship with the Lao citizen and it is not normally workable for new foreign investors. It was stressed that in significant-sized transactions the leases or other governing agreements are prepared with professional legal advice (at some cost) and are sometimes lodged with village chiefs, a court or other Governmental authorities to give them additional weight and recognition. It was also pointed out that disputes under leases and trust agreements can happen and that, when they do, there is not an efficient State mechanism (in the courts or otherwise) to resolve them.

Summing up, the complication of land holding is one of many factors which contribute to a difficult investment climate for business (foreign-owned businesses) but it is not, in context, the greatest difficulty. Others, such as obtaining investment approvals, business regulatory approvals from Ministries and provincial authorities, and company registration (discussed in other sections of this Report), can be yet more complicated and take longer to obtain or arrange.

Larger foreign projects in Laos. A separate case is presented by several large projects in Laos which are governed by custom-negotiated concession agreements that are themselves individually approved by the National Assembly. The very largest of these is the “NT2” (Nam Theun 2) hydroelectric dam project, now underway involving financing of \$1.45 billion with support from the World Bank and Asian Development Bank and whose equity owners include Electricite de France and Thai utility and construction companies, as well as a Lao Government holding company. Another large project is the Oxiana copper and gold mining project owned by

Australian investors with State involvement. Other concessions in mining, coffee and other sectors were cited by persons interviewed.

Due to their individual importance (including their often huge taxpaying potential), these large projects get considerable attention and help from the Government in a way that small and medium-sized foreign investments do not. This is a real problem that should be addressed, since the development and encouragement of SMEs is, in the long term, more important for the Lao business climate than may individual “special” projects. Several persons who were interviewed made this point and expressed the view that these large projects are crowding out the Government’s attention.

Survey, titling and registration of title. A major factor inhibiting land markets in Laos is the absence of a reliable, standardized survey and titling system. The Implementing Decree recognizes this with detailed provisions charging the National Land Management Agency and provincial, district and village bodies with titling responsibilities and by specifying the documentation needed to establish title (Articles 12-13). Uncertainty and disputes over ownership and boundaries continue, however, to be a serious problem. There simply is no efficient way to resolve them in the absence of good title records.

The matter of records is now being addressed – and should be resolved to significant degree – by a comprehensive land titling project being managed by AusAid (of the Government of Australia) and the German Government Gesellschaft fuer Technische Zusammenarbeit (GTZ) with the support of the World Bank. Lao Government officials affirmed in interviews that this project has their strong support. Its announced aims are to provide security of tenure in all provinces, to alleviate poverty, and to enhance Government revenue.

Phase 1 of the project, which involved developing an overall policy (and included assistance in drafting the Implementing Decree) is finished. Phase 2, now underway, concentrates on “capacity building” – development of Lao Government capacity in multiple provinces through training in surveying and registration procedures. The project involves surveying the land through aerial and GPS mapping, and it also has a valuation component for developing accurate valuation of land for tax purposes. The project has concentrated first on titling of urban and industrial land but is being expanded to agricultural land. It has thus far worked in nine provinces. It will ultimately result in publicly filed map and owner indexes for all land covered, and the land will be registered and guaranteed under a torrens system (common in Australia and also in many U.S. states) in which registered ownership is not subject to question, making such devices as title insurance and lawyers’ title opinions unnecessary. It will also include registration of mortgages although not of leases.

The land records project is very much a long-term endeavor which is difficult to hurry. Among other things, boundary disputes sometimes require on-the-ground resolutions such as neighbor meetings and mediation by village leaders. When completed, however, the new system will add significantly to the security of landholding in Laos.

C. Implementing Institutions

Land management agencies. Under the Land Law and the Implementing Decree, various state, provincial, district and village land management agencies have sweepingly described authorities, the limits and the division of which are not at all clear.

The Land Law states that the National Land Management Authority is charged with coordinating with the local land management authorities and (also) entrusting sectoral management of land use to the separate six Ministries referred to above (Article 9), and that all of the various national and local land management authorities have duties which include drafting policies and regulations relating to land management, zoning and land use supervision; granting and revoking land use rights; collecting fees on land; resolving land disputes; keeping land registration books and issuing titles; demarcation of land categories (such as agricultural vs. forest vs. industrial vs. construction, etc.) to be submitted to “higher administrative authority for approval”; and “performing other rights and duties assigned by the Government” (Article 10).

The Implementing Decree has a different laundry list which includes charging the local authorities (province, city, special zone, district/municipality, and village) with ensuring land management and control, managing land valuation, and conducting land control (Articles 7 and 8); charges the National Land Management Agency with valuation of all land for various purposes – but to do so based on proposals from the local agencies and then to report its conclusions “to the Government for consideration and decision” (Article 10); and also gives the four levels apparently overlapping duties relating to surveys, mapping, title issuance and document registration (Article 12).

Although there are some established practices, the Land Law itself is hopelessly unclear and confusing on these points. This legislative ambiguity leads to inconsistencies in practice, jurisdictional disputes, and a discouraging opacity to potential investors. Adding to the confusion is the fact that the land registration office in Vientiane continues to operate the Department of Lands in the Ministry of Finance, even though the Land Law was intended to (and by its terms does) remove it to the Land Management Agency.

Ministries. As stated above, the Land Law also grants sectoral land management authority to six Ministries.¹⁹ In addition, the Implementing Decree charges five of these six (all but the Ministry of Information and Culture) with the duty to undertake research on policies and regulations relating to land management to be presented to the Government for approval (Article 6).

As with the Land Management Agencies, the policies, approval powers, approval time deadlines – and their limits – are not at all clear. All of the persons interviewed stated that this also adds to the unpredictability and expense of land transactions.

¹⁹ These are the Ministry of Agriculture and Forest; Ministry of Communication, Transport, Post and Construction; Ministry of Industry and Handicraft; Ministry of National Defense; Ministry of National Security; and Ministry of Information and Culture (Article 9).

D. Supporting Institutions

Lao National Chamber of Commerce and Industry. The Chamber of Commerce views itself as an advocacy body for private businesses. Its members include both foreign and domestically-owned businesses and comprise about 10% of all privately-owned companies in Laos. Its personnel advise members generally on matters such as investment approvals and new business formation. It could be a helpful source of advice on land transactions and approvals also. The Chamber has a staff of about 25 persons but suffers from inadequate funding for its overall objectives; it is funded by member dues of about \$20 per year which it has not been able to increase. It was formerly a part of the Ministry of Commerce but is now a free-standing, quasi-Governmental unit.

Courts. The courts are the ultimate recourse for resolution of land disputes whether involving title, lease or contract questions or other matters. However, the courts are generally viewed as slow to decide and lacking in expertise and independence and thus, as a practical matter, not very useful.

Private lawyers, accountants and other professionals. Various types of professionals are useful and important in structuring, documenting and dealing with Government officials in facilitating and land transactions and getting them done.

E. Social Dynamics

Privately-owned businesses in Laos are heavily dependent on land use and there is both a need and a strong desire (a “market”) for land use rules that are more clear, more objective, and less all-embracing. Steps listed in the recommendations below can help toward that end.

Given the complexity and the large number of Governmental players in the present system, however, only a major re-do of the laws and entrenched practices would be able accomplish this.

There does not appear to be either the sense of urgency or the political will needed for such a task.

F. Recommendations

The following recommendations are made:

- Without delay, Article 8 paragraph 2 of the Implementing Decree should be implemented. This provision states:
 - “With regards to the detailed division of rights and functions of the Land Management Agency of each local level, there shall be a separate regulation specifically issued by the National Land Management Agency.”
- Implementation should include the following:
 - Describe those rights and functions precisely and without overlap;
 - Combine them into fewer agencies and levels to the maximum extent that doing so is practicable and politically appropriate;

- Expand the scope of the regulation to specify *in one place* all of the approvals which are needed for the acquisition, use, lease, sale of and construction on land by a Lao citizen or a foreigner, and state the procedures for obtaining each approval and the time limit within which a proper application must be granted; and
- Expand the scope of the regulation to include the six Ministries as well as the Land Management Agencies at each level.
- Post, on the website of the Land Management Agency, the following:
 - An early draft of the above regulation for public comment;
 - The Land Law and the Implementing Decree; and
 - All forms to be used for permits and all Land Management Authority announcements and other regulations.
- Encourage investment in Laos by making the rules and procedures for land use by foreign persons simpler, more transparent, and thus more secure. Consider the following:
 - Allowing certain foreign persons (such as long-term residents and persons or companies making investments over a stated amount) to have land use rights the same as or similar to those of Lao citizens; and
 - Issuing a formal regulation or law clarifying matters about which there may now be uncertainty such as rules for: foreign ownership of buildings and other attachments on land; companies or joint ventures which are partly foreign-owned; the holding of land by Lao citizens for the benefit of foreign persons; and eliminating or reducing investment license requirements for foreign holding of residential property.
- Establish training programs for State, Provincial, District and Village officials on all of the above.
- Continue and encourage expansion of the titling project described above.

V. Secured Transactions Law

A. Introduction

Secured lending is an essential element of an effective market economy. By reducing the risk to the lender, it allows a business or a person to borrow more funds at lower cost. A modern secured lending environment also allows a business or person to borrow, but keep possession of their assets, thus increasing liquidity.

A number of elements make up an effective secured lending environment. The lack of any one element will impair the entire system. There must, of course, be the proper legal framework, allowing the taking of secured interests and their registration with a State-sanctioned authority. An effective registration system in turn requires a functioning registry. Finally, should the debtor default, resulting in a need to exercise the creditor's rights, there must be effective enforcement.

None of these elements are present in Laos. The legal framework is flawed. The registry does not yet exist. And ineffective enforcement, endemic in the entire legal system, negatively impacts the growth of lending as well as development of the economy in general.

As a result, there is almost no secured lending in Laos. A few lenders are willing to take security interests in vehicles, and there is some consumer credit for household goods in Vientiane. Otherwise, banks actively avoid taking security interests in movable assets.

B. Legal Framework

The principal legislative framework for secured lending is set forth in the Law on Secured Transactions, No. 2005/06, dated 20 May 2005. This law replaced an older law from 1994.

The law is quite strange. Unlike most secured transactions laws, it is not restricted only to pledges in movables. It also deals with mortgages and with guarantees (which are viewed as a form of security). The law also covers possessory pledges²⁰ and “pledges with documents,” which are pledges in which the lender takes the title documents but the borrower keeps the property. Since the law is very short – just 40 articles, or about nine pages in translation – this means that it deals with all these topics in a very brief and cursory manner.

The law is so short and so vague that a list of its problems and omissions might be longer than the law itself. A few points, however, are worth noting.

First, the law provides for two sorts of security interests. There are “securities pursuant to law” and “securities pursuant to contract”. “Securities pursuant to law” arise by action of law, and include garnishment of wages and tax liens. They have priority over all other security interests. This is, of course, not very encouraging to potential lenders, since it means that a security interest can be eclipsed by an unanticipated lien.

²⁰ Articles 12-14. This is odd, because the Lao contract law also covers possessory pledges, and in much more detail.

The law allows for a “pledge with documents,” by which the lender takes the ownership documents of the collateral, but the borrower keeps the use of it. This section is occasionally used for lending on cars and other vehicles. The law also allows for lending on warehouse receipts (Article 17), but this provision does not seem to be used.

Remarkably, the law allows for the collateralization of intangible assets, including shares in a company, intellectual property, bank accounts, and contract rights. It does not allow for the collateralization of future assets. Still, this is relatively advanced. On the other hand, although the law provides for security interests in inventory, it gives no protection to a final purchaser in the normal course of business.

The law does not make priority in filing clear, nor does it state that priority gives notice to third parties. No procedure is given for registration of pledges. The law does not state that secured debts have priority in bankruptcy. Oddly enough, though, the law does have a concept of perfection – unregistered pledges are still valid against the pledgor, but are not binding against third parties.

The law makes multiple references to auctions (Articles 14, 16, 24, 34), but auctions are not a normal part of commercial activity in Laos. (Foreclosures of mortgages do happen once in a great while, but they do not result in an auction; the property is either transferred to the creditor, or simply sold on the market.) This contributes to the general impression that the law was hastily drafted with little input from stakeholders.

Although the law is flawed, it is not so bad as to make secured lending impossible. Secured lending in Laos is stunted, not merely because of the law, but because implementing institutions are weak or absent and understanding of the principles underlying non-possessory pledges of movable goods is low.

C. Implementing Institutions

There is no **registry** for secured transactions. Mortgages are registered at the land management office, while loans on vehicles are registered at the motor vehicle bureau. Article 31 of the law provides that “a Security Contract must be registered at the Registration Office of the Department of Finance.” The Department of Finance, however, has no such office. Careful searching did not find any office there, or anywhere else, for the registration of secured transactions.

The **Motor Vehicle Bureau** does register some security interests in vehicles. Registration is reasonably quick – one day, with a small payment of “speed money.” Most of these are purchase money security interests for motorbikes.

The **courts** are severely flawed – weak, slow, and unreliable. There is a broad perception that courts are more sympathetic to debtors than to creditors, which makes creditors reluctant to put themselves in a situation where they would have to appeal to the courts for enforcement. The weakness of the courts appears to be a major deterrent to secured lending. All actors – banks,

businesses, lawyers, accountants – agreed that this was probably the single largest factor preventing the development of secured lending. For more details on the court system, see this Report's chapters on Commercial Dispute Resolution and Contract Law.

The **village leaders** have a minor role in secured lending. In Vientiane, at least one dealer in white goods was willing to extend consumer credit (for purchases of refrigerators.) The dealer would do this because, if the buyer did not make payments in a timely manner, he could go to the village leader. The leader would work to resolve the issue and could, potentially, go to the purchaser's residence, take the refrigerator, and bring it back to the dealer. Apparently this has happened at least once.

D. Supporting Institutions

Supporting institutions are also very weak. **Banks** show little interest in secured transactions. Due to distrust of the court system and problems with debt enforcement generally, Laotian banks do not like to lend on any collateral but land. The state-owned Agricultural Development Bank will take a security interest in farmer's crops, but the other banks simply will not lend against movable assets. Banks do occasionally take security interests in fixtures and equipment, but this is always appurtenant to a mortgage, and the resulting interest is not registered.

There are no services specifically devoted to filing or registration assistance. **Private lawyers** are not common, nor are they particularly commercially sophisticated; they are generally not aware of the potential of secured lending.²¹ The local bar association has no interest in this topic. Professional **business associations** do profess an interest in secured lending, but say that the banks are completely uninterested in lending on movables. Business associations expressed interest in various forms of financing, including factoring (receivables financing) and finance leasing. Clearly there is a market for new types of financing.

Auctions of movable property do not exist in Laos.

The **law school** does not teach a course on secured transactions, although the topic is briefly mentioned in the context of bankruptcy. The **media** do not play any role at all. In general, there is little public awareness of secured transactions as a commercial tool (although pawnshops and village money lenders are both quite common).

Notarial services are available, but nobody uses them for collateral registration.²² There is a lack of notaries in outlying areas; at the moment, there is one notarial office in every provincial capital.

Although notaries are not relevant to secured transactions at this time, they do offer one interesting possibility: as a nation-wide network of State-supported offices, they could perhaps

²¹ There are very few exceptions, such as the Mekong Law Group. These exceptions tend to be firms that do business with foreign investors. However, the average private lawyer in Laos is a solo practitioner. Most of these lawyers have limited resources and very little exposure to modern commercial practice.

²² The media in Laos are entirely state-controlled, although Thai TV and radio are available and popular. The State-controlled media show little interest in business or commercial matters.

be used as the basis for a collateral registry. Several European countries use notaries in this way. Pledges are registered with them; the notary charges a fee, then transmits the information to the central registry. This could make sense in Laos, where all notaries are already part of State offices. (For more information on Laos' odd notary system, see the chapter on contract law.)

E. Social Dynamics

The banking sector generally is rather conservative. About 70% of the banking market is held by the four state-owned banks, which show little interest in new techniques or products. The privately owned banks are more aware of the potential of secured transactions, but are not willing to take risks until debt enforcement becomes easier and more reliable. The standard model for commercial loans is of heavily over-collateralized loans secured by land and buildings. This seems unlikely to change in the near future.

F. Recommendations

In light of the above, this Report makes the following recommendations:

- Redraft the secured transaction law, with maximum possible publicity and stakeholder input. Donor coordination should be pursued here, as several major donors would potentially be interested. The World Bank has often made secured transaction reform a conditionality in developing countries, while JICA has experience with helping the Lao Government draft and pass new commercial laws.
- In light of the problems with the court system, include provisions for expedited enforcement. Although self-help is an alien concept in Laos, it should be possible to make some use of Laos' strong tradition of non-court dispute resolution.
- Open a pledge registry office for movables. Ideally, this should have branches nationwide. Realistically, it may only be plausible in Vientiane at first. However, it might be possible to "piggyback" on an existing network, such as the system of notary offices.
- Investigate the possibility of drafting and passing laws for finance leasing and factoring (receivables financing).

VI. Bankruptcy Law

A. Introduction

Laos has a Bankruptcy Law, but nobody uses it. There is only one active case of formal bankruptcy, it has been in stasis for over a year, and is not expected to resolve soon. Under the current legal framework, it is unlikely that there will be many more.

B. Legal Framework

Laos's Bankruptcy Law dates back to 1994, when the country was just beginning its transition to a market economy. It is Law 06/94, passed on November 14, 1994. Unlike some other Laotian commercial laws, the Bankruptcy Law has not been rewritten, nor amended by subsequent decrees.

The law has some positive aspects, but it contains a number of serious flaws, and cannot be considered an effective modern bankruptcy law.

- The law does not include an effective, modern **rehabilitation** procedure to save viable businesses. It lacks guidelines for effecting rehabilitation, provisions for communicating adequate information to creditors, or systems for independent review of pertinent information.
- It is not clear whether the court has **discretion** to reject a bankruptcy petition.
- The law is very weak on **procedural** aspects of bankruptcy. For instance, there is no clear system of **notice** to creditors.
- The role of the **Assets Control Committee** – the body charged with overseeing the rehabilitation or liquidation of an enterprise – is vague, and it overlaps with the authority of the court. Article 14 of the law gives the court several specified powers, including the power to oversee the firm's management. Article 18 of the law assigns the Committee very limited duties; basically, they "inspect and control the assets" of the enterprise, and seek to prevent fraudulent conveyances. And Article 16 states that the firm may continue to carry on business "under the supervision of the court and the Assets Control Committee." In other words, the law gives vague and potentially contradictory roles to court and committee, without giving clear control over management to either.
- On the other hand, there is virtually no mechanism for the **Creditors Committee** to properly assume a contributory oversight role. Articles 21 and 22 give the Creditors Committee only the power to propose reorganization plans, propose liquidation plans, and "offer opinions" to the court.
- The law gives no role whatsoever to bankruptcy **Administrators**. International best practice entails bringing in professionals who are knowledgeable about business matters and capable of restoring an enterprise's financial well being, which may include restructuring debt, changing business practices, improving methods of corporate

governance, or even selling the enterprise as a going concern. The Laotian law does not do this. In fact it does not mention or contemplate outside administration at all. Whether restructuring or liquidating, an enterprise remains under the control of **existing management** – subject to weak and conflicting oversight from the Assets Control Committee, the Creditors Committee, and the Court. This is not consistent with international best practice, and does not give creditors confidence that key decisions will be made by individuals who are both expert and independent.

- The law has a very limited set of **priorities**. Article 44 requires payments to be made in the following order: worker salaries, taxes and other debts to the State, secured creditors, unsecured creditors. No priorities are given to lawyers, assessors, administrators, or other bankruptcy professionals, nor to other sorts of enterprise liability such as pension funds. Debts incurred after bankruptcy are treated the same as debts incurred before it. Liability for worker salaries is not capped, which is understandable in a socialist country, but can have the perverse effect of encouraging creditors to push for swift liquidation before salary debts devour all assets. And placing tax debts before secured creditors is not consistent with international best practice.
- Individual managers and board members of a bankrupt enterprise are **banned** from holding management or board positions in another enterprise for a period of three years (Article 47). This puts an unnecessary stigma on bankruptcy and is not consistent with international best practices.

The law does have some positive aspects. It recognizes the distinction between viable but troubled enterprises, and nonviable ones that must be liquidated. It does not distinguish between foreign and domestic debtors. It encourages mediation (which is a positive theme throughout Laotian commercial law). There is a strong focus on prohibiting fraudulent conveyances, which are often a problem in a developing country commercial environment. And unlike, for instance, the Vietnamese Bankruptcy Law, it does not emphasize a perceived relationship between business failure and criminal activity.

There is no law for the bankruptcy of banks, nor does the Bankruptcy Law contain provisions for such. The National Bank is said to have regulations that touch on this topic, but they have never been translated into English.

C. Implementing Institutions

The courts are probably not ready to handle major bankruptcy cases. Laos's courts are lacking in training, staff and equipment. There is a Commercial Chamber within the court system, but it is new, and has almost no experience in bankruptcy cases. The Government has never issued decrees or guidelines for dealing with bankruptcy, and no donor seems to have taken an interest. For more detailed discussion of the Laotian court system and its problems, see this Report's chapter on Commercial Dispute Resolution.

Administrators. There are none. The concept of bankruptcy administration as a profession does not exist. Some of the functions of a bankruptcy administrator are held by the various

committees – Asset, Creditors, and Liquidation – created by the law. And the court has a vague but broad power of oversight. But there is no equivalent to an administrator.

It would certainly be possible to train bankruptcy administrators in Laos. However, it would involve starting from scratch. Furthermore, there would be human resource issues. There are not many people in Laos with the necessary commercial and administrative competencies to administer large or complex bankruptcies. Laos does not use international accounting standards (IAS). In the words of one interviewee, “All the people in the country capable of conducting a complex audit or other high-end accounting function could be seated around a table.”

Of course, not all bankruptcies are large and complex. It should be relatively easy to train administrators for simple restructurings and liquidations. Still, such a training course would have to be designed with care. Even basic concepts such as “an administrator’s role is to maximize the value of assets returned to creditors” may not translate readily to a socialist commercial and legal system.²³

Creditors. In Laos, state-owned banks are responsible for about 70% of all commercial loans. State-owned banks make a great many directed loans, and have much higher non-performing loan rates than private banks. Thus, if a bankrupt enterprise has secured creditors, they are likely to be state-owned banks.

State-owned banks are not aggressive creditors. They tend to view large debts as political questions rather than economic or legal ones. Even with smaller debts, they are more likely to seek collection rather than resolution. They are willing to carry large amounts of debt for quite long periods of time if there is a prospect of eventual repayment. They do pursue some debts through the court system, but they have limited interest and capacity for entering into such uncharted legal territory as creditor-driven bankruptcy.

There is a small but growing community of private banks in Laos. These banks, which account for about 30% of the commercial loan market, follow very different lending patterns from the state-owned banks. They are much more reluctant to carry debt. While they view court actions as a very last resort, they will pursue debt resolution more aggressively than state-owned banks.

This does not mean that they are interested in bankruptcy. Private bank loans tend to be heavily collateralized, almost always with land and buildings. Collateralization of 100%-200% is the norm, and larger figures (such as a \$10,000 loan secured by a \$100,000 office building) are not unusual. As the Lao banking market matures, this may change, but at the moment these banks have little incentive to start bankruptcy proceedings; they would rather just proceed against their collateral.

Businesses may also have individual creditors. However, individual Laotians tend to be shy of the courts. A Lao creditor must be strongly motivated before bringing a formal collection action. Bringing a bankruptcy action would be very unusual.

²³ For instance, in many post-Communist countries in Eastern Europe and Central Asia, a bankruptcy administrator may be seen as primarily responsible for saving jobs, collecting unpaid taxes, or even maintaining uneconomic but export-generating production lines.

In interviews with various commercial creditors, it was noted that few creditors – whether banks or individuals – seemed aware of the Bankruptcy Law, and none expressed any interest in using it.

D. Supporting Institutions

Lawyers. The general standard of commercial legal practice is not high to begin with, and the fact that only one bankruptcy case has taken place under the law means that very few lawyers in Laos have direct experience in the field. The Bankruptcy Law is taught in law school, but by rote and in isolation, not as part of an integrated system of creditor's rights. There is no continuing legal education in bankruptcy. No donors have provided training in recent years.

Appraisers/valuation professionals. There are none. There are accountants who could provide valuation services, but there are no professionals trained in appraising business assets. It should be noted that while the law allows assets to be auctioned (Articles 39 and 41), there is no tradition of commercial auctions in Laos.

Various business associations, including the *Laos Chamber of Commerce and Industry*, smaller sector-specific or regional business groups, and even the community of foreign Chambers of Commerce, could potentially be resources in the overall effort to improve access to and understanding of commercial law in Laos, including bankruptcy.

Company registers, tax authorities, and other local agencies. Although statistics are maintained concerning the registration of new businesses, Laos currently does not have a means of monitoring the “disappearance rate” of new firms. In an effort to improve public understanding of the new Bankruptcy Law, the information and statistics maintained by different agencies should be tapped as potential sources for understanding the actual rate of insolvency in Vietnam.

The media. The media do not discuss bankruptcy.

E. Social Dynamics

Ignorance and stigma. There is very little understanding of what bankruptcy is and what purpose it serves. This is true of all but a few very sophisticated actors. State-owned banks, government officials, and private lawyers and businessmen alike, all view bankruptcy as a pathological and vaguely shameful condition.

There is a mild but persistent stigma attached to the concept. This should be placed in a regional context: it is much milder than in Vietnam, where bankruptcy is viewed as tremendously shameful. Nevertheless, bankruptcy is vaguely associated with criminal conduct, managerial incompetence, or at least bad luck. Small businesses in Laos are often family run, or at least financed by borrowing from family members; thus, business failure is often more than just an individual misfortune. Bankruptcy is thus seen as vaguely shameful, and there is little idea of a “fresh start” or a “clean slate”.

Limited and negative experience. Despite much searching, the team was able to find only a single example of formal bankruptcy. This was a garment factory that had proven unable to pay its debts. The factory was owned in part by foreigners and in part by local Laotian investors. A concerned creditor triggered the bankruptcy proceeding.

Thus far, so good; but the state then intervened, and asked the judge to appoint representatives of three Ministries to the Assets Committee.²⁴ The main motive of the Committee immediately became political: to prevent the owners, especially the foreign owner, from making off with any assets, and to preserve the jobs created by the company. The intervention of the Ministries has slowed proceedings to a crawl; the factory is supposed to be going through restructuring, but is unable to do so. Creditors' interests have been sidelined. It now seems likely that the firm will end in liquidation, with creditors getting very little return. All in all, it has not been a good flagship case for the law.

State-Owned Enterprises. Laos's economy is still dominated by state-owned enterprises (SOEs). SOEs do not go bankrupt. Unprofitable SOEs are subsidized. Grossly unprofitable SOEs are reorganized. The biggest creditors of SOEs tend to be other SOEs and state-owned banks; these entities have no interest in pushing each other into restructuring or liquidation.

In theory, under the law, a single private creditor could petition to force a SOE into bankruptcy. But this would be a very bold if not foolhardy action, and unlikely to be viewed with sympathy by either the Government or the courts.

Informality. To oversimplify, where a private business is in trouble, then either its creditors will let it try to work matters out, or they won't. If they do, this is done informally. All parties would prefer to avoid the slow and not very competent court system. It should be noted that "informal" does not mean "unprofessional." One interviewee, a garment factory, went through a de facto restructuring in the wake of the 1997 economic crisis. The factory had two local creditors, a state-owned bank and the Lao landlord. The manager of the factory reported that negotiations went on for months and were, in his words, "very hard-nosed." The outcome was that both creditors agreed to defer some months of payments, while the landlord took a partial debt-for-equity swap. The manager found this an acceptable outcome, and in the end the factory survived.

While not all troubled businesses find such a positive resolution, the relative simplicity of most business arrangements in Laos, and the strong traditions of informality in contracting and in dispute resolution, mean that many issues can be dealt with outside of court. (For further discussion of informality in Laotian business arrangements, see this Report's chapters on Contract Law and Commercial Dispute Resolution.)

Over-collateralization. As noted, creditors will either allow a debtor-business to try to restructure, or they won't. Most businesses have only one secured creditor, because state-owned banks and private banks alike have a strong tendency to over-collateralize. This is, of course, a reasonable response to the high-risk lending environment.

²⁴ This may have been, strictly speaking, illegal. Article 15 lists six members for an Assets Committee, and none of them are from any Ministries. On the other hand, the law does not state that this is an exclusive list, so perhaps a court could add other interested parties at its discretion. (Or, as in this case, at someone else's discretion.)

In practice, it means that a business has at most one mortgage. (Lending on movables is almost unknown.) This in turn means that the power of life or death for a business lies in the hands of the bank holding the mortgage. If the bank decides to foreclose, the over-collateralization means there is not likely to be much left for the unsecured creditors.²⁵ Thus, nobody has a strong incentive to start a bankruptcy action. The bank can get its money through a simple foreclosure action,²⁶ while the lesser creditors will get little or nothing once the bank has taken the land and buildings.

A new Bankruptcy Law, while desirable, is probably not the highest priority for Laos right now. The current law is flawed, but even a well-drafted law might not get much use, because the environment does not favor formal insolvency. The dominance of SOEs and state-owned banks, the lack of secured transactions, the very marked tendency for banks to over-collateralize, the lack of sophisticated assessors and appraisers, the weakness, politicization, and general lack of capacity of the courts – all of these push creditors away from filing for bankruptcy.

Some of these things will change over time. The role of both SOEs and state-owned banks is steadily shrinking; by 2008, more loans will be coming from private banks than from public ones. International accounting standards are gaining ground, and foreign accounting firms in Laos are training young Laotian accountants as fast as they can. More complex financing techniques – secured transactions in movables, finance leasing, factoring and reverse factoring – should begin appearing soon. As the commercial environment evolves, demand for a proper Bankruptcy Law should grow up with it.

Thus, a new Bankruptcy Law should be a medium- or long-term, rather than an immediate, goal.

F. Recommendations

In light of the above, this Report makes the following recommendations:

- Within the circumstances noted above, Laos is due for a new Bankruptcy Law. The current law simply does not work. There is no shortage of donors with an interest in drafting new commercial laws, so it should not be difficult to find partners. Engaging the Government's interest may be more difficult, but the Laotians have shown willingness, if not enthusiasm, to consider new laws.²⁷ The general principles of Bankruptcy Law are well known, and there are well-defined standards and international best practices.²⁸ Applying these in Laos should be relatively straightforward.

²⁵ In theory, the bank would foreclose, sell the property for market value, and then give the rest back to the debtor for distribution to the other creditors. However, "market value" is a slippery concept in a country where there are few real estate brokers and no auctions. In practice, a foreclosing bank is likely to offer the property for sale to the first buyer who can pay the outstanding loan amount plus costs.

²⁶ Actually, foreclosing on a mortgage in Laos can be excruciatingly difficult. But it is simpler than starting an involuntary bankruptcy.

²⁷ The Lao Government has been passing one or two new commercial laws per year for the last decade or so. Broadly speaking, the quality seems to have gone up over time.

²⁸ These include the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems (April 2001); the International Monetary Fund's Orderly and Effective Insolvency Procedures (May 1999); the Asian Development

- A Bankruptcy Law is useless without administrators. Administrator training should begin well in advance of the passage of a new law.
- Commercial Court judges should receive comprehensive training in Bankruptcy Law, with respect to both concepts and procedures under the new law and the underlying principles of formal insolvency in a market economy.
- Supporting institutions, such as business groups, the law school, and the media, should be engaged as part of a public education initiative that emphasizes the importance of formal exit procedures and the removal of the social stigma that is currently attached to bankruptcy.
- For the benefit of potential foreign investors who will be interested in the state of Laos's bankruptcy system, an English-language version of the current law, with commentary, should be posted on commonly accessible Internet sites.²⁹ When the new law is passed, it should promptly be translated and posted as well.

Bank's Good Practice Standards for an Insolvency Regime (April 2001); the European Bank for Reconstruction and Development's Insolvency Checklist (2002); and the many sources of guidance provided by the International Insolvency Institute.

²⁹ Only an unofficial translation is available now. It does not include any commentary and is not available online.

VII. Competition Law and Policy

A. Introduction

The overarching goal of adopting a competition law is to create a regulatory framework to enhance efficiency and consumer welfare. Recognizing these benefits, the Government of the Laos has engaged in efforts to design a comprehensive competition policy strategy. These efforts include, among other initiatives,³⁰ a Decree on Trade Competition issued in 2004 by the Prime Minister that is intended to serve as a starting point for the enactment and implementation of a national competition law. The challenges now lie in creating an enforcement agency and preparing effective legislation. Success in both of these endeavors will depend on building the necessary political support for these initiatives, as well as widespread education and consensus-building to inform business and consumers of the benefits of competition. Overall, considerable effort on the part of Government is needed to improve the Laos' competitive environment so that the country may maximize the benefits of membership in ASEAN and ASEAN Free Trade Area (AFTA), and a market economy more generally.

B. Legal Framework

While certain Lao laws have competition-related provisions, there is currently no competition law in Laos.³¹ The 2004 Decree on Trade Competition ("Decree"), however, is the first step in a process that is expected to lead to the legislative drafting of such a law, and serves as the starting point for an important initiative designed to help the strengthening of competition policy in Laos. While the wording of the Decree promotes these aims in the broadest sense, it also presents challenges identified elsewhere as typical in Lao laws and regulations, *i.e.*, lack of clarity and precision,³² and from an international comparative perspective, certain aspects may benefit from further elaboration and clarification.

As the Government may modify the Decree, and the modified Decree will likely greatly influence preparation of a complete draft competition law, this section offers article-by-article comments and suggestions to improve the Decree and ultimately, a competition law.³³

³⁰ Other efforts include wide-scale privatization and concessions; the introduction of a new law on foreign investment that increases incentives to invest in Laos; the creation of sectoral regulators to govern industries such as telecommunications; and major reductions in tariff and non-tariff barriers. Detailed discussions of many of these reforms are discussed elsewhere in this report, and thus not addressed in this chapter.

³¹ Article 13 of the 2003 Lao Constitution, for example, encourages competition in all economic sectors.

³² Dr. P A S Dahanayake, *Making Markets Working better for Development and Poverty Reduction: Lao PDR* (2005) at 10. The Vice Minister of Justice recognized the need for revisions to improve these weaknesses of the laws generally, stating that most laws contain general terms without explaining specifics, particularly in the area of trade and investment laws, and that "many people use the gaps in the laws to their benefit." Vice Minister of Justice, *Vientiane Times*, 13 August 2004, cited in Dahanayake, *supra*, at 10.

³³ These comments and suggestions represent some of the thoughts of the individual assessor and are not meant to be taken as comprehensive or as the comments of the U.S. competition agencies. More detailed assistance will be necessary. Assistance would likely increase the Lao law's compatibility with international norms.

Objectives – Article 1

Article 1 states that the Decree was issued to “define rules, measures and enforcement to regulate monopolization, and unfair competition in trade of all forms, aiming to promote fair trade competition, protect the rights and legal interests of consumers and to encourage business activities in the Lao PDR to function efficiently in the market economy mechanism as determined by the Government of the Lao PDR.” Depending on how it is understood and applied, some of the language of this Article may encompass goals beyond the core competition objectives of protecting consumer welfare and promoting economic efficiency. For example, the Article says that a goal is “to regulate monopolization.” One way this phrase may be understood and applied is to prevent monopolies from engaging in anticompetitive or exclusionary conduct. This would be consistent with core competition goals. Another way this phrase may be understood and applied is to impose government oversight, planning and interference with the operation, pricing and output of firms that happen to have monopolies. This would be inconsistent with core competition goals and antithetical to the functioning of competitive markets. Some regulation of natural monopolies may, of course, be necessary, but this regulation may be accomplished better if sited in a separate sector regulatory body. The aim “to promote fair trade” may also encompass goals beyond the core competition objectives. This phrase may be understood to mean something akin to the prohibition against unfair trade practices found in the U.S. FTC Act consistent with competition goals. It may, however, mean the protection of enterprises from the hard knocks of legitimate competition from more efficient enterprises. This is how many countries have applied the language of “fair trade”, to the detriment of competition. Clarification or refinement of the language of these goals would reduce the analytical complexity of any competition review and remove the possibility that the language will result in application of the Decree in a way inconsistent with the goals of competition.

The requirement that the market economy mechanism be “determined by the Government of the Lao PDR” is also very problematic language. It may, in effect, permit those enforcing the competition Decree to consider goals that are not articulated in this Article and may jeopardize the independence of the competition authority by increasing the opportunity for political influence in competition analysis. This does not suggest, however, that the Government should not promote some non-core competition objectives. Rather, the promotion of goals not consistent with competition should be separated from the competition review to increase the transparent assessment of these different goals. It should also be recognized that some consumer welfare and economic efficiency may be sacrificed in order to achieve these goals.

Definitions – Article 2

Several of the definitions in this Article would benefit from redrafting. The definition of market dominance,³⁴ for example, relies too much on market shares as evidence of dominance. A large market share, in and of itself, does not necessarily measure the ability of a firm to charge supracompetitive prices. The proper focus should be on significant and durable market power – that is, a firm’s ability to price substantially above the competitive level and to do so for a significant period without the erosion by new entry. Besides market shares, factors such as entry conditions must also be taken into account.

³⁴ “‘Market dominance’ is defined in the decree as sales volume and market share of any goods or services one or more business entities are above that prescribed by the Trade Competition Commissions.” Article 2.

The definitions of merger and acquisition are quite general. Since firms and agencies need clear and easily understandable guidance, it will be necessary to flesh out in much greater detail what kinds of transactions would be covered. As written, the agency would be required to review nearly every business transaction. Further suggestions are offered below in the commentary on Article 9.

Article 7

Article 7 states: “The Government of Lao PDR encourages business entities of all economic sectors to undertake businesses under the competitive conditions with equality, fairness, and cooperation.” This appears to repeat and emphasize the goal of “fair competition” already stated in Article 1. Because “fairness” is coupled in this Article with “equality” and “cooperation” it appears more clearly than in Article I that the Decree views protecting individual competitors rather than protecting the competitive process as a goal of competition policy. The two goals can and do sometimes conflict with each other. A policy that protects inefficient firms from failure will also prevent successful competitors from reaping the rewards of their efforts to the detriment of the competitive process.

Article 8

Article 8 prohibits “any act stipulated in Articles 9, 10, 11 and 12 . . . to monopolize any market.” If this means that the stipulated acts are prohibited only if they “monopolize a market,” then, for the most part, this is a good qualifier and will direct enforcement against conduct that harms competition. Some of the practices listed in Article 10, however, should not be subject to this qualifier as explained in more detail below in the discussion of Articles 10 and 11.

Article 9

To the extent that Article 9 prohibits mergers and acquisitions that monopolize or substantially lessen competition, this is similar to the language in the U.S. Clayton Act. The Article, however, also prohibits acquisitions that “destroy competitors.” This seems to suggest the same kind of thinking found in other Articles of the Decree that appeared aimed at protecting individual competitors at the expense of competition. At some point, those who enforce this Decree will likely find the need to issue regulations requiring merging or acquiring parties to notify the Government so that the transaction can be reviewed in time to prevent irreparable damage to competition. Some technical assistance in drafting these merger notification procedures will be useful, and the Recommended Practices for Merger Notification and Review prepared by the International Competition Network (ICN) should be considered.³⁵

Article 10

Article 10 states that “[i]t is prohibited for a business entity to act or behave that could bring losses directly or indirectly, such as dumping, limiting or intervention with intent to eliminate other business entities.” It is not clear in what kind of conduct this Article intends to prevent. Certainly many pro-competitive business activities will eliminate other businesses, and most price cutting benefits consumers. Article 10 would benefit from additional language that makes

³⁵ The ICN is a voluntary organization of virtually all of the world’s competition agencies, and the membership has unanimously adopted a series of Recommended Practices that represent a consensus of best practices. See <http://www.internationalcompetitionnetwork.org/guidingprinciples.html>.

clear that the enumerated conduct is prohibited only if it harms competition or, as stated in Article 8, “monopolize[s] a market.”

Article 11

The relationship between Article 8 and 11 is critical to the understanding of Article 11. If Article 8 applies and requires proof of monopolization, then the effect is under-deterrence. If Article 8 does not apply and all of the conduct listed in Article 11 is prohibited without regard to its effect on competition, then the effect is over-deterrence. If Article 8’s requirement that conduct have the effect of monopolizing a market applies, then it imposes an unnecessary burden on those trying to prove an anticompetitive violation in the case of price-fixing and bid-rigging arrangements between competitors,³⁶ and explicit market divisions between competitors, the activities listed in the first, third, and seventh bullet.³⁷ This conduct can be condemned without proof of effect because experience and economic theory demonstrate that the conduct always harms competition. If, however, Article 8 does not apply, then Article 11 prohibits conduct that may actually be pro-competitive such as, for example, exclusive supply or distribution agreements. This Article illustrates the need for resolving ambiguities in the Decree before it becomes law and modifications are more difficult.

Article 12

Article 12 concerns agreements between Lao and foreign businesspersons. Few, if any competition laws make a distinction between foreign versus local companies forming cartels for a number of reasons. For example, cartels, regardless of the nationality of the cartel participants, eliminate competition to the detriment of consumers. They have no redeeming economic benefit and should be prosecuted accordingly, provided there are sufficient effects in Laos.

Article 13

Article 13 leaves in the hands of the competition enforcement authorities the power to grant exemptions to entire sectors or to individual businesses, and to take into consideration socio-economic or security factors, factors outside the special competency of a competition agency. The Article also says nothing about whether the exemptions may be granted before or after parties have engaged in conduct prohibited by the decree.

Vesting the enforcement agency with such enormous, virtually unfettered power and having the express authority to base exemptions on reasons other than those related to competition will open the agency to great outside pressures. With little guidance on what criteria to use, the agency will be subject to accusations of unprincipled decisions. Because it appears to be within the agency’s power to grant these exemptions to individual enterprises who have not yet engaged in the prohibited conduct, experience from other jurisdictions suggests that the agency may find itself flooded with applications.

This exemption provision appears to be modeled, in part, on competition laws common in Europe where stipulated conduct is prohibited without consideration of its effect on competition. In such a system, a mechanism for exemptions for conduct that does not harm competition is

³⁶ According to the Dahanayake study, *supra* note 32, bid-rigging in particular is a serious problem in Laos.

³⁷ A clarification that this conduct only applies to agreements among competitors is a necessary addition.

necessary. It is not clear, however, that this Decree has adopted this system of absolute prohibitions found in some countries' laws. As explained above Article 8 appears to limit the prohibitions of conduct listed in Articles 9, 10 and 11 only to situations where that conduct is "to monopolize a market". If that reading of Article 8 is correct, then this Decree needs no exemption mechanism. If that reading of Article 8 is not correct, then uncertainty can be alleviated through a voluntary advisory opinion procedure.

Additional Provisions

It will help the competition agency to be a more effective advocate for competition policy if the Lao competition law, when it is drafted, includes in it a specific role for the competition agency to provide advice, influence and participate in government economic and regulatory policies in order to promote more competitive industry structure, firm behavior and market performance.³⁸ For example, the provisions could allow for a compulsory review of new legislation or explicitly provide the Commission the power to deliver opinions ex officio.³⁹

As discussed in the recommendations section, when the Lao government begins drafting a competition law it should seek input from a variety of national and international experts, taking into account the particular characteristics and needs of the Lao economy and politics and the criteria for merger notification recommended by the ICN.

C. Implementing Institutions

The Decree provides for the creation of a **Fair Trading Commission** in Articles 5 and 6 and specifies that: "[t]he Trade Competition Commission shall consist of concerned parties of the trade sector and a number of elders" and "[t]he Minister of Trade, by virtue of his position, is the Chairman and appoints members of this Commission. The Trade Commission shall have its office and permanent secretariat within the Ministry of Commerce." The diversity of commissioners is presumably to guarantee representation of various constituencies. While this goal is laudable, there is a danger that commissioners appointed to represent specific constituency will have parochial interest. Therefore, the number and type of such seats on the Commission set aside for groups such as consumers or business should be limited. Commissions composed of legal or economic competition experts with a general mandate have worked well in other jurisdictions.

Regarding the agency's placement within the **Ministry of Commerce** and having the **Minister of Trade** as the Chairman, the success of this model appears directly related to the degree of independence the agency has from political influence. If the Ministry is too involved in the work of the competition agency, it can happen that the agency makes economically sensible decisions that are trumped by the non-competition related goals of the ministry. Decisions, for example, resulting in inefficient firms with many employees being disadvantaged may cause conflict between the agency and the ministry. One solution may be to have an agency that is administratively part of a ministry, but is substantively independent or have an agency that is independent of any existing ministry. On the other hand, an agency that is wholly insulated from

³⁸ For more information on advocacy, including its importance for new agencies, see http://www.cfc.gob.mx/icn_infocenter/.

³⁹ The International Competition Network (ICN) has prepared a compilation of advocacy provisions which are available on the Internet at: http://www.cfc.gob.mx/icn_infocenter/files/Model_advocacy_provisions.DOC.

any connection to the rest of the government may not be properly funded, have its views on competition issues respected by other government agencies, or be appropriately accountable. Institutional decisions relating to independence should be made with a country's particular political and legal culture in mind, and various existing Lao models should be considered in designing the organization of the Commission.

Interviews suggested that the Government is currently considering other organizational, procedural and structure issues. There are several attributes that experience has shown are important to the successful functioning of a competition agency. First, and most importantly, the agency must be empowered with adequate institutional mechanisms for both investigation and prosecution. These mechanisms include legal and administrative processes for gathering evidence, procedures for challenging activity that the investigation reveals to be anticompetitive, and procedures to enforce any measures that may be ordered as a result. To ensure fairness and promote public confidence, all of these processes should be immunized, to the extent possible, from improper outside influence. Second, the institutions and procedures should also contribute to an enforcement process that is conducted expertly, expeditiously, and independently. The competition agency should have, for example, resort to enforceable legal process for acquiring the information it needs to conduct its investigations, with appropriate penalties for non-cooperation or non-compliance. Similarly, fines collected for violations should not be paid to agency employees or directors, or to the agency itself, but rather into the national treasury, in order to avoid creating incentives that might give the appearance of distorting the independent application of the law. Finally, the competition agency should also have the power to advise or advocate with other government institutions in favor of economic measures that benefit competition, as discussed above. These practical issues for a well-functioning agency are the kinds of issues on which consultations with other more mature agencies can be of help.

D. Supporting Institutions

Courts and judiciary. The courts would be the likely enforcement authority for the competition agency's decisions, and specifically the People's Supreme Court. The judiciary is theoretically independent, and judges are appointed by a standing committee of the National Assembly. Two factors affect the efficacy and independence of the judiciary, however: the lack of availability of laws and alleged corruption.⁴⁰

The private sector. The distinction between the private sector and the government in Laos is not always clear, as close relationships with the government are necessary for succeeding as an entrepreneur. Until recently the Chamber of Commerce was part of the Ministry of Commerce, and today most trade associations remain within the government. Despite this close relationship, the Decree appears to have been prepared by representatives of government with only limited involvement of the private sector. As a result, the Decree reveals some degree of priority for public sector objectives, while concerns of the private sector – such as how competition policy practices would affect business operations, how to minimize associated private sector costs and interference into business practices, etc. – are less well reflected. It might therefore be advisable

⁴⁰ See *Dahanayake*, *supra* note 32, at 10.

to invite private sector representatives to comment on a draft law and to provide inputs, possibly in the form of workshops or seminars.

In addition to consultations with the private sector, educational programs are also necessary. Certain members of the business community, including chambers of commerce and industry and business associations, are unfamiliar with competition law generally, and many were unaware that the Decree existed, or that enactment of a law was being considered.

Academia. Lack of adequate academic and training resources will be the biggest obstacle to successful long-term implementation of a competition law. Most of the Lao population was educated under central-planning economics and economic law, and there does not appear to be the widespread reform efforts in education that are necessary to train decision-makers and other stakeholders in market economics. Very few resources are allocated to law faculties, and few classes offered in any type of business law, with extremely limited expertise within the faculty. Most Lao people with training in advanced business law received their education outside of Laos. Only a few Lao officials are trained in competition law or industrial organization.

A new private masters program in economics was recently established, with assistance from Vietnam and China, and this program could eventually incorporate classes on industrial organization. Similar efforts are necessary in the field of law, both in the private and public universities. These would need to be supplemented by specific training programs in competition law analysis, as suggested in the Recommendations section of this chapter.

E. Social Dynamics

Initiatives aimed at improving the environment for competition law and policy in Laos have progressed, albeit at a slow rate. The Government has made efforts at economic reform, and the 2006 Economist Intelligence Unit (EIU) country report states that “[d]espite the fact that economic reforms continue to be implemented only in a gradual fashion, the government maintains the support of foreign donors, many of whom have praised the government for its efforts.”⁴¹ The same report predicts that there will be improvements in the overall quality of the business environment in 2006-7, in part because of a new enterprise law and amendments to a foreign investment law. Although “the pace of economic reform will remain gradual . . . the Government’s efforts to join the World Trade Organization may provide some impetus.”⁴²

Despite improvements, however, Laos performs poorly on global economic openness indicators. In the Heritage Foundation’s Index of Economic Freedom for 2006, for example, Laos ranks 149th out of 157, considerably worse than Cambodia (68th) and Thailand (71st), but similar to Vietnam (142nd).⁴³ Perhaps the greatest obstacle to reform will be overcoming the legacies of a socialist economy. Again, the EIU report explains, “[r]estructuring loss-making state-owned enterprises remains high on the government’s reform agenda, but this is one of the most

⁴¹ Economist Intelligence Unit (February 2006), “Laos: Country Report” at 8.

⁴² *Id.* at 3.

⁴³ The Index of Economic Freedom is available by country at:
<http://www.heritage.org/research/features/index/countries.html>.

challenging tasks, partly because of the vested interests of the LPRP [the political party] members in these firms.”⁴⁴ An effective competition policy could facilitate this restructuring.

A recent United Nations Committee on Trade and Development-commissioned study highlighted specific examples of anticompetitive practices that demonstrate the benefits that could be realized with adoption and enforcement of a competition law.⁴⁵ The study examined the barriers to competition in Laos. The study alleges many private restraints to trade, for example in the transportation industry, as well as a number of government policies that restrict firms’ ability to compete, for example entry prohibitions in the tourism industry. Private restraints can take the form of cartels masquerading as trade associations or tying agreements, and public restraints can range from price controls to overly burdensome licensing requirements.

Although an effective competition law can minimize many anticompetitive practices, it will be of utmost importance that the political environment in Laos is supportive of the passage the law. In the Lao context, it is possible that efforts to adopt a competition law will be met with resistance by the National Assembly, as many Assembly members are likely unfamiliar with competition law, and others are unwilling to empower an agency to engage in activities that may limit the government’s ability to protect the vested interests of party members. This resistance would suggest that at this stage, efforts should be directed towards building political support for competition law and policy.

F. Recommendations

The following is recommended:

- Provided there is adequate Lao government support for introducing a competition law already, consider promoting passage and implementation of a competition law through a strategy that prioritizes awareness campaigns:
 - Develop a series of seminars to promote private sector support, drawing on examples from Laos and/or neighboring countries.
 - Develop a series of seminars to educate the National Assembly and involved ministries about competition law.
 - Prepare an advocacy brochure for the National Assembly members, explaining in clear, basic language the principle purposes of a competition law in the Lao context, drawing on examples from existing studies (*e.g.*, Dahanayake report).
 - Hold training seminars for the National Assembly and interested members of relevant ministries.
- Draft a competition law, soliciting input from the private sector, local think tanks, and international experts; and disseminate the draft widely for comments.
- Promote a competition culture through public communication including: preparing communication/media materials; enhancing the capacity of media in publication of competition-related issues through dialogue/workshop with journalists; engaging in

⁴⁴ EIU Report, *op. cit.*, at 8.

⁴⁵ For a fuller explanation, see Dahanayake, *supra* note 32 at 24 et seq.

dialogue/workshops with related law enforcement officers, other government regulators, and the business and academic communities.

- Following passage of the law, provide technical assistance to make the law operational, including assistance in the following areas: (a) planning and setting priorities of the new agency; (b) assistance in drafting any required implementing regulations; (c) developing internal agency operating procedures for handling complaints, investigations, and exemptions; and (d) training agency staff in case screening and investigative techniques.
- Develop university classes and regional training programs for staff.
- Continue advocacy initiatives, including reviews of government policies and regulation affecting competition, and preparing studies on key sectors.

VIII. Commercial Dispute Resolution

G. Introduction

The state of Commercial Dispute Resolution in Laos presents an almost overwhelming disincentive against foreign direct investment at any level other than the highest scale, and similarly discourages the growth and diversification of existing domestic businesses. Although a relatively sound framework of laws now supports the resolution of commercial cases – one that, in fact, effectively incorporates the country’s strong tradition in favor of Alternative Dispute Resolution – vast challenges remain.

The desperately needed reforms in the arena of Commercial Dispute Resolution begin with Laos’ system of basic and legal education, where conditions are exceptionally weak. The need for reform further encompasses the courts – in particular, the recently established commercial court “chambers” at the provincial and appellate levels – along with the various executive-branch institutions that have judicial-related functions. Also, the fact that the universe of implementing regulations in Laos is virtually unknown and inaccessible means that courts, executive agencies, and private parties have very limited knowledge of their actual rights and responsibilities.

H. Legal Framework

The sources of “Kotmai” in Laos – that is, formal law that has been enacted by the National Assembly – consist of its Constitution and approximately 60 Laws passed since 1986. In addition, Laos’ legal regime incorporates a body of Presidential Ordinances, Prime Ministerial Decrees, and other various orders, decisions and regulations promulgated by various ministries. Although access to the “Kotmai” is relatively easy, these other sources of law are “not necessarily published and sometimes not easy to access,” according to one representative of the Ministry of Justice. In fact, there is no definitive library or database for all sources of law, nor an official system for tracking legal changes. Although translation into English of most commercial laws has taken place, some laws still need to be translated.

The post-1975 Government of Laos adopted its Constitution in 1991 and significantly amended the document in 2003. Although the new Constitution does not spell out the full extent of the authority of the Lao People’s Revolutionary Party, its Preamble and Article 3 establish the Party as the political system’s “leading nucleus,” wholly responsible for creating the Republic in 1975.

The amended Constitution of 2003 includes certain major changes to the court system. First, Article 79 created an appellate court, reportedly for the purpose of hastening the resolution of disputes. Second, pursuant to Article 81, the authority to appoint judges effectively moved from the Ministry of Justice to the National Assembly, where the Standing Committee (a small group of legislators consisting of the National Assembly President, Vice-President, and “a number of members” who work year-round) now appoints judges based on the recommendation of the President of the Supreme People’s Court. Under Article 53, the National Assembly in its entirety appoints the President of the Supreme People’s Court.

Although these changes and some others might suggest a stronger inclination toward the independence of judges, the fact that the Law on People's Courts (Article 14) and the Law on Civil Procedure (Article 37) empower the Public Prosecutor to “monitor” or “inspect” the courts as they resolve civil cases ensures that judges will never behave in a way that is perceived as *too* independent. Similarly, the fact that the Assembly's Standing Committee has the authority “to interpret and explain the provisions of the Constitution and its laws” – and thereby may override decisions of the Supreme Court (*see* Article 56(2) of the Constitution) – defeats any pretence of judicial independence in Laos.

Laos incorporates the two major methods of Alternative Dispute Resolution – mediation and arbitration – at nearly all first-instance opportunities. Opportunities for mediation and arbitration in commercial cases are found at the village level, through the village leader; the Economic Arbitration Board; and in the commercial chambers of the provincial courts, where mediation by one judge must be attempted before the case proceeds to trial before a panel of three judges. This strong tradition of Alternative Dispute Resolution represents a best practice in the region, although the fact that none of the official tribunals engaged in ADR are independent of the State restricts the ultimate effectiveness of the rule of law.

Most commercial laws enacted since 2003 were drafted with the considerable input of various donors and are regarded as relatively strong and market-oriented. The framework of laws pertaining to the various procedural aspects of Commercial Dispute Resolution in Laos encompasses the following:

Law on People's Courts (October 23, 2003). This Law establishes the general framework of courts (Articles 12 and 15), the jurisdiction of the courts (Article 13), the responsibility of the Supreme Court to oversee the administration of the courts (Article 13), and various other aspects of judicial qualification, appointment, authority and administration. Pursuant to the Law, the system of the people's courts that pertains to commercial disputes is comprised of:

- **The People's Supreme Court (1 court).** Neither the Constitution nor the Law on People's Courts defines the number of judges who will sit on the Supreme Court. In practice, the Supreme Court consists of nine judges. Pursuant to Article 80 of the Constitution, the Supreme Court “examines and reviews the decisions reached by [the people's courts],” a provision interpreted by its members as meaning that they should address matters of law only, rather than revisiting matters of fact. In addition, the Supreme Court is charged with administering the lower people's courts, a function previously held by the Ministry of Justice.
- **The appellate courts (3 courts).** These newly created courts are located in the northern, middle and southern region of Laos. Pursuant to Article 35 of the Law, each appellate court has the following “chambers”: criminal, civil, commercial, family, juvenile and “other.” These courts are charged with hearing appeals of final decisions made by the provincial and city courts.
- **The people's provincial and city courts (18 courts).** These courts are charged with adjudicating “at first instance those cases which are not within the jurisdiction of the district and municipal courts” and considering appeals from the first-instance decisions of

the district and municipal courts. Pursuant to Article 80 of the Law, each provincial or city court has criminal, civil, commercial, family, juvenile and “other” chambers. The commercial chambers of the provincial courts constitute a new mechanism in Laos that is exclusively devoted to the resolution of commercial claims involving business-related matters.

- **The people’s district and municipal courts (141 planned courts; 54 currently functioning).** According to Article 47 of the Law on People’s Courts, the main role of these lower-level courts “is to educate the people about the laws and to mediate parties’ disputes; they also adjudicate minor criminal cases and small claims for civil cases, as provided by the laws.”

Law on Civil Procedure (May 17, 2004). This lengthy Law generally addresses all aspects of dispute resolution in the courts, including summons, evidence, representation, deadlines, appeal, and various other steps in the process. Article 48 of the Law defines the jurisdiction of the commercial chambers as follows:

1. Cases relating to business or commercial [disputes];
2. Cases relating to business or commercial contracts, or commercial documents such as promissory notes, bills of exchange, cheques and other documents;
3. Cases relating to commercial loan agreements;
4. Cases relating to enterprise bankruptcy and liquidation;
5. Cases relating to business or commercial relationships in connection with the import or export of goods, transportation of goods, insurance, banking and financial services, marketing [services], and agency;
6. Cases which the Office of Economic Dispute Resolution has sent to a court for enforcement;
7. Cases relating to violation of copyright and trademarks; [and]
8. Other cases relating to business and commercial relationships.

In addition to establishing jurisdiction of the commercial chambers, the Law requires commercial chambers to attempt to mediate disputes prior to subjecting them to a trial (Article 52).

Law on Economic Arbitration (May 19, 2005). This Law has not yet been officially translated into English. Reportedly, the Law broadens the function and authority of the Economic Arbitration Board, an office within the Ministry of Justice that is charged with resolving commercial disputes between both domestic and foreign parties. If the two parties choose to take their dispute to this Board (or if their contract mandates that they do so), this Board will attempt to mediate or arbitrate the dispute. There is no monetary limit on disputes that may be submitted to the Board. Panels for arbitration consist of three individuals drawn from the Board’s official list of arbitrators, or one mediator drawn also from the official list. Parties that fail to resolve their dispute through mediation may submit their case either to arbitration within the Board or to the commercial chamber of the Provincial court. Arbitration decisions are final and eligible for appeal only in the most limited circumstances.

Law on Local Administration (October 23, 2003). In Laos, there are three levels of local administration: (1) the provinces, cities, and, in certain exceptional cases, special zones; (2) the districts and municipalities; and (3) the villages. Although courts exist for the purpose of resolving disputes in the first and second of these categories, this Law codifies the role of the village leader in mediating and helping to resolve small-scale disputes, including commercial disputes, at the village level.

Law on Judgment Enforcement (May 15, 2004). This Law sets forth the procedures for “execution of final, legally effective and proper court instructions, orders, decisions at first instance, decisions on appeal, decisions on cassation, and other judicial acts.” After defining these terms, this Law sets forth the administrative responsibilities of the Ministry of Justice, as well as its provincial offices and district-level units that are charged with executing the courts’ orders. Pursuant to Part III of the Law, the work of the local offices and units is to take place in four stages:

- Study the final judgments and other juridical acts in order to prepare for the enforcement;
- Summon litigants to notify them of the terms of the judgments and to advise and encourage them to comply therewith;
- Take actual steps to enforce the judgments; and
- Certify that the enforcement of judgments is complete.

The Law authorizes offices and units to inspect, attach and confiscate a debtor’s property, with certain limited exceptions.

Law on Notaries (effective 1990; Office of Notaries established 2002). This Law establishes certain requirements for notarization of documents and establishes an office within the Ministry of Justice that is the exclusive provider of notarial services in Laos.

Decrees, Ordinances, and Regulations. Although Laos’ set of laws pertaining to commercial dispute resolution is generally straightforward, clear, and accessible, the status of implementing decrees, ordinances, and regulations is far murkier, with the universe of this framework undefined and inaccessible even to the country’s own Ministry of Justice. For example, the Office of the Prime Minister enacts as many as 10 decrees each year, many covering topics of interest to the commercial and trading community, such as distribution of goods, management of import and exports, pricing of goods, taxes, intellectual property, state investments, and so forth. No public hearing is required to enact an ordinance. The drafting of decrees is typically delegated to line ministries by the Prime Minister’s Office. Although the Ministry of Justice plays a role in reviewing draft decrees and other regulations, it often does not receive a final copy. Similarly, courts are rarely informed of decrees, ordinances, and regulations that may affect the outcome of a dispute. This absence of clarity, access and quality control in the formation of these and other sources of regulatory authority is a problem that constrains the development of and trust in the rule of law in Laos.

I. Implementing Institutions

The chief implementing institution with respect to Commercial Dispute Resolution is the **court system**, including **commercial chambers within the provincial, appellate, and Supreme courts**. At this time, there are 207 judges in Laos who have been formally appointed by the National Assembly at the recommendation of the Supreme Court. More judges are expected to be appointed as courts continue to be established and strengthened in the districts and provinces. Judges must be law school graduates and have three years of experience before they commence training at the State-sponsored Judges Training Center. Although the total number of judges who work exclusively in the commercial chambers in Laos was not available, the fact that three out of 16 judges in the Vientiane Capital Court serve exclusively in this capacity suggest that the full complement of commercial judges in Laos will range from about 35 to 50 (with some judges also responsible for hearing civil cases). Court representatives do not see themselves as particularly overburdened by commercial cases at this time – in Vientiane, for example, the commercial chambers handles about five trials per month and 4-7 mediations per month. Since the Constitution of 2003, the Supreme Court has resolved fewer than 10 commercial disputes.

The creation of commercial chambers in 2003 is generally regarded as a positive step toward streamlining the resolution of commercial cases and improving the command of commercial court judges over the subject matter areas they can expect to cover. The comment of one advisor of foreign companies, however, is illustrative of the general perception of the quality of these courts:

“We would never try to get a judgment from the courts,” he said. As stated by another local lawyer, “We never go to the courts.” Limitations on the effectiveness of the courts include the following:

- No guidelines or rules of procedure and evidence specifically pertaining to the commercial courts have been issued.
- Although judges have some access to training through the Judges Training Center and occasional opportunities to study abroad, there is not yet a formal curriculum created for commercial matters. Thus, the ability of commercial judges to deal with such complex topics as financial services, secured transactions, bankruptcy, and intellectual property – all within their subject-matter jurisdiction – is highly restricted.
- Rather than weighing the evidence as it is presented by both parties, the commercial courts typically appoint their own “experts” to help them understand their cases. The process for qualification, appointment, and compensation of experts is entirely opaque, thereby contributing to a lack of trust in court decisions.
- Cases that have a political or social dimension that may be of concern to the Government – such as bankruptcy – have been abandoned by the courts, which do not regard themselves as empowered to render judgment in such matters.
- Judges have little access to written resources that might help them resolve cases in a manner that is predictable and consistent with prior decisions. For example, they rarely access the decisions made by other provincial courts or by the appellate courts and

Supreme Court, even on matters entailing a similar set of facts. They similarly lack access to Government decrees, orders and regulations, as noted earlier.

- As detailed in this Report's section on Court Administration, judges have little access to tools of information technology that may bring better consistency, predictability and substantive quality to their decisions.

Notwithstanding these issues, it is notable that not all participants in the court process are wholly dissatisfied with the results. At least three parties who had been involved in commercial disputes in the past noted that they were generally satisfied with the results, and that the judges generally ruled on their cases fairly and in a timely fashion. That said, there is wide agreement that cases involving highly controversial or political matters, or ones involving large amounts of money, can expect to be influenced, either directly or indirectly, by Government or Party forces.

The **Ministry of Justice** holds a variety of roles with respect to the implementation of Commercial Dispute Resolution. The Economic Arbitration Board, the offices responsible for Execution of Judgments, and the Notary office are each housed within the Ministry of Justice. In addition, the Ministry of Justice holds a variety of functions pertaining to legal drafting, research, and training. Although the Ministry at one time had responsibility for publishing an Official Gazette containing copies of all laws, decrees, ordinances and other regulations, a lack of funding is the stated reason for the virtual abandonment of this effort.

The **Economic Arbitration Board** is housed in the Ministry of Justice and is charged with resolving civil and commercial disputes through mediation or arbitration at the election of the parties. The Board has a few Alternative Dispute Resolution professionals on staff, but also publishes a catalog of arbitrators and mediators who are available to help resolve cases. In addition to holding a standard level of professional experience, designated arbitrators and mediators undergo a three-month program of training by the Ministry of Justice. The process of application and selection of arbitrators and mediators is somewhat opaque.

There is no minimum or maximum value of cases permitted to be submitted to the Board. Mediations are handled by one mediator, whereas arbitrations are resolved by a panel of three.

Parties who submit cases to mediation preserve their right to go to court, if no resolution is reached. Under such circumstances, a signed record from the mediation proceeding may be submitted to the court.

There is only limited judicial review of arbitration decisions. Such cases may be reversed on appeal only where the arbitrators' decision "violates the process of law," is inconsistent with an international treaty, or conflicts with "national security."

In 2005, the Board received over 100 expressions of interest in its services and reportedly ended up resolving a total of 87 cases through mediation: 8 cases where both parties were foreigners; 40 cases between one foreign party and one domestic party; and 39 cases in which both parties were domestic. Three cases were resolved through binding arbitration, each reportedly concerning building construction contracts.

The system for **execution of judgments** in Laos, a function of the Ministry of Justice and its various local offices and units, is under severe strain and is generally perceived as ineffective. According to observers both within and outside of the execution agency, the following issues hamper effective enforcement of civil orders and criminal judgments: (a) a lack of competent staff; (b) a limited knowledge of the law within the agency's legal staff; (c) a lack of funding for provincial offices and district units; and (d) a lack of understanding of the execution process among other State officials, including court clerks, police, and prosecutors. Although the main execution office conducted a one-day training program in cooperation with the Embassy of the United States following the enactment of the Law on Execution in 2004, it has since reportedly received no additional support, either from the U.S. or from other donors.

At least 20,000 judgments remain un-enforced in Laos. At this time, the agency does not conduct auctions of property, because no official decree has been issued on that matter.

The value of the **Notary Office** with respect to the resolution of commercial disputes in Laos is unclear. In general, notarization of documents is not mandatory. It is inexpensive to notarize documents, however, and lawyers do so for the perceived security of having their document reviewed by this State agency. Courts generally expect that the contracts they review will have been notarized, and regardless of their content, are more inclined to favor parties who have notarized their documents.

The resolution of small commercial disputes by **village leaders** represents a useful method of resolving small economic disputes quickly and efficiently. The village leader is elected every two years by villagers from a list of candidates fielded by the Government. The leader serves many functions, among them dispute mediation and resolution, family and juvenile issues, and security. The leader focuses on "small problems," while larger issues involving criminal activity are referred to the police.

With respect to commercial disputes, the village leader acts generally as a mediator particularly in cases that are undocumented – that is, where there is no formal contract or official document to consider. These cases typically concern personal debt or inheritance. The village leader successfully resolves up to 60% of the disputes submitted to his office. There is an expectation, though not a requirement, that smaller cases will go before the village leader before they are submitted to the courts. Cases before the village leader can be resolved in a short time, a week or two, or up to three months for complex cases.

A host of groups qualify as implementing institutions in their capacity as drafters of laws, ordinances, decrees and regulations. These include the **National Assembly**, the **Office of the Prime Minister**, the **Office of the President**, the **Ministry of Justice**, and the line Ministries, including the **Ministry of Commerce**, the **Ministry of Industry**, and the **Ministry of Labor**.

J. Supporting Institutions

The fact that indigenous non-Government organizations are not permitted to be formed in Laos means that the community of support for Commercial Dispute Resolution consists mainly of State agencies, donor-funded initiatives, and certain private or quasi-private interests.

Although there is no independent association of judges in Laos, a **conference of judges** from throughout the country meets every two years. This conference provides a limited opportunity for judges to share information and compare their experiences with colleagues.

Lawyers have traditionally not played a significant role in Laos, either in the process of facilitating business growth and development or in resolving disputes. Instead, lawyers have chiefly focused on criminal law and the transfer and registration of real property. On the other hand, lawyers are playing an increasing role in commercial dispute resolution: about 40% of parties appearing before the commercial chambers are represented by lawyers. To become a practicing lawyer – that is, a member of the **Lao Bar Association**, which currently has only 69 members – an individual must graduate from law school and participate in apprenticeship.

There is no money, it is said, in becoming a private lawyer in Laos. The Government employs about 200 new lawyers each year and more jobs can be found in line ministries.

At this time, the main **Law Faculty** in Laos holds virtually no capacity whatsoever to train new lawyers to practice within and support a market-oriented commercial law system. Established in 1987, the Law Faculty was first administered by the Ministry of Justice and now falls under the jurisdiction of the Ministry of Education. The faculty in Vientiane houses 2200 students and operates a day and a night program. Approximately 800 more students are trained elsewhere in the country. For day students, the cost of the education is free; night students pay about \$2 per credit or \$35 per semester.

Day students at the Law Faculty study under a five-year curriculum. After spending their first year at the main university campus, they engage in “basic study” of law during their second and third years and then, for their fourth and fifth years, elect to study in one of three chambers within the faculty: Political Science; Judiciary; or International Relations. Night students have a four-year curriculum, entailing all but the first year of study engaged in by the day students. Although there reportedly “may be a new interest in developing a division in Economic Law,” the palatable lack of commercial law expertise in the existing faculty does not suggest the capacity to do so in the near future. For example, only those students within the Judiciary chamber reportedly study the law of contracts at any time in their law school experience.

There is virtually no writing and research requirements within the Law Faculty curriculum. Students must complete a single writing requirement, following a two-month internship, as a requirement to graduate.

The Law Faculty obtains copies of laws either from the National Assembly or the Ministry of Justice. The Law Faculty appears to have no better access to the universe of decrees, ordinances and regulations afforded any other institution in Laos, other than the Office of the Prime Minister.

The Law Faculty has limited relationships with other law schools, such as the Hanoi Law Faculty and the National University of Vietnam. The Law Faculty is contemplating a possible future

masters program in cooperation with National University of Vietnam. The Law Faculty receives limited curriculum assistance from UNDP.

The Law Faculty does not endeavor to track the careers of its graduates or to provide them with any career guidance services. It is expected that most graduates will work for the State.

The **Judicial Training Center** is an institution housed within the Ministry of Justice that is charged with training judges, arbitrators, notaries, prosecutors, court clerks and others. Training is not developed systematically; rather, the Center is a facility for each of these groups to conduct their own training, usually on an ad hoc basis. The Center is reportedly staffed by 15 people at the expense of the French Government. Donors seeking to train individual groups of professionals, such as judges or court staff, often work through the Center.

The **Law Research Institute** within the Ministry of Justice was established in 2004 in cooperation with foreign groups such as JICA. This Institute is endeavoring to improve the environment for commercial law, such as through limited cataloguing of the regulatory framework and through the development of a text book on property law and contract law. The Institute aspires to create a legal database for the country, a much-needed addition to the legal “infrastructure” in Laos.

The **Lao National Chamber of Commerce and Industry** is a quasi-independent organization of about 800 businesses, mostly firms with direct foreign investment in the country. LNCCI’s principal role is one of advocacy for the private sector, serving as the link between business and the various State institutions regulating commerce to expand business opportunities, and increase the member’s competitive position in the regional and global marketplace. The organization reviews drafts of all commercial-related laws and regulations, conducts direct dialog with ministries through its industrial sectors, and sits as charter members on Governmental committees formed with trade representation.

Private schools and universities, including the well regarded Lao American College and various other organizations that have limited authorization to grant bachelor’s degrees, are contributing to an atmosphere of freer education and choice in Laos. Although certain of these schools are considered academically weak – several do not even have libraries – others are encouraging discussion of new topics, such as business ethics. As a condition of operation, all private schools are required to provide a mandatory course of “Lao Political Thought.”

The **media** in Laos is not free. As summarized by one foreign observer, “You will never see anything remotely critical of the Government.” All reporters are employees of the Ministry of Information and Culture. Thus, critical analysis of the environment for Commercial Dispute Resolution in Laos is not available, other than through the donor sector. Significantly, however, the Government has not cut off or restricted access to the Internet.

The **donor community** plays an enormous, arguably disproportionate supporting role in the area of Commercial Dispute Resolution. Such groups as the UNDP, the Asian Development Bank, the International Monetary Fund, the World Bank, and various bi-lateral agencies such as JICA, the Canadian Bar Association, the French embassy, and the Swedish Institute for Development

Assistance are direct and support efforts in legal drafting, implementation of law, and skills training. A working group on governance helps coordinate these activities, and donor coordination is said to have improved dramatically in recent years. There is no official Government coordination of these efforts, however, suggesting a lack of real engagement in and ownership over the changes that are being promoted from the outside.

K. Social Dynamics

Although Laos has developed a legal framework in recent years that is significantly more conducive to a market-oriented economy than in the past, the “social dynamics” surrounding the resolution of commercial disputes may be summarized in three general, less than optimistic points: (a) Laos’ historic isolation and poverty has resulted in a cadre of professionals that currently lacks basic research and writing skills and capacity for critical thought; (b) the lack of financial resources in Laos means that most institutions charged with supporting Commercial Dispute Resolution are unable to function effectively; and (c) the fundamental absence of judicial independence in Laos represents a critical barrier against achieving a true sense of a rule of law in Laos, a fact that will discourage meaningful investment in the country for years to come.

Human resources. Laos suffers today over the fact that, for generations, its system of primary and secondary education has been impoverished and unable to serve its people. Teachers are paid next to nothing; children often are malnourished or required to work during school hours; books are virtually unavailable to students in the provinces; and a culture of fear discourages the development of critical thought at all educational levels. Skills such as writing, research, and analysis are rarely encouraged or practiced. Moreover, because the State stands as the primary source of employment outside of subsistence farming or micro-enterprise, education is rarely correlated with greater opportunity or prosperity. For example, although the Law Faculty operates a night school that mainly serves State workers, attainment of a law degree is not generally seen as a way to improve one’s economic circumstances: “Everyone makes the same salary,” one local observer explained. This lack of incentives for education, along with fears associated with criticizing the Government, has resulted in a passivity that can only change through massive systemic transformation. Even if significant political changes were to take place, or an influx of capital was obtained, the limitations in Laos’ educational system and the literacy and capacity of its population would take a generation to correct. Such a process can begin only when the resources are available to do so.

Financial resources. The fact that the Lao Government must support a bloated bureaucracy in the absence a significant tax base or private sector means that the legislative, executive and judicial functions it is responsible for will never achieve their potential, even when donors give generously. The potential receipts of \$100 million per year to be added to the economy through operation of the country’s new dam beginning in late 2009 bode well only to the extent that the Government seizes the opportunity to support smaller investors through improved services. For example, the full legal framework of laws, decrees, ordinances, and regulations remains unknown in scope and virtually inaccessible to foreigners (only the “Kotmai” has been translated in significant part). Judicial decisions are not catalogued or accessible to anyone. Judges lack training in and exposure to a modern complement of commercial laws and the resolution of cases

is regarded as highly unpredictable. The execution branch of the Ministry of Justice fundamentally lacks the resources to carry out its work. Considerable demand exists for fixes to all these problems – and most of the solutions are quite straightforward – but the financial resources to support improvements simply are not yet available.

Judicial independence. Only dramatic political transformation will bring Laos into an era where its judges are truly independent. Although various laws give “lip service” to the idea that judges will base their decisions on the facts of the case and the law that applies to it, the sorry fact remains that judges must constantly be mindful of how their conduct is perceived by the People’s Revolutionary Party. To deliver a decision which conflicts with Government or Party priorities could subject a judge to the “monitoring” and “inspecting” function of the Public Prosecutor, and in the absence of full capitulation, might even land the judge in prison. Thus, although individual cases may certainly receive fair treatment in Laos, the truth remains that the rule of law in Laos is captive to the interests of a one-party state. Laos is not China: it does not offer a massive workforce and market to “compensate” for this fact. Thus, the absence of a rule of law in Laos hugely discourages outside investment.

L. Recommendations

In its 2003 *Evaluation of the Implementation of the Rule of Law in Lao PDR*, the United Nations Development Programme (UNDP) set forth a variety of recommendations pertaining to the Ministry of Justice, the courts, and the various communities involved in legal education, training and drafting. Three years later, most of these recommendations remain fundamentally unanswered. Thus, for a comprehensive resource of specific changes that would improve the state of Commercial Dispute Resolution, that document serves a central resources.

Priority areas with respect to reform include the following:

- The universe of law in Laos, including not only the “Kotmai,” but also decrees, ordinances, regulations and the decisions of the Supreme Court and the appellate courts, must be published, catalogued, and placed in a central repository, both in hard copy and online, so that it is accessible to all interested parties.
- For the benefit of foreign investors, the sub-group of laws, regulations, and court decisions that specifically pertain to commercial matters must be catalogued, translated, and placed on-line.
- The Law Faculty must significantly bolster its capacity in commercial law areas. A clear curriculum for law students should be spelled out and the local and donor community should develop a comprehensive plan for meeting the identified curricular needs, through contributions of faculty, materials, short and long-term training opportunities, and library resources.
- Judges in the Commercial Chamber should receive significant training over the next several years in each of the areas that they can expect to face cases on, including the topics of contracts, enterprises, bankruptcy, secured transactions, intellectual property, financing, and others.

- The private bar should be encouraged to become more engaged, as the Lao National Chamber of Commerce and Industry has, in the improvement in the legal framework and the implementation of the law.
- Even within its existing constraints, the media should be encouraged to inform the Lao people more effectively about the structure of commercial law in Laos, and in particular their ability to define and protect their legal rights through the use of contracts.
- Laos' tradition of Alternative Dispute Resolution, and its integration of ADR into the legal framework, should be regarded as a best practice in the region.

IX. Court Administration

A. Introduction

Laos' court system is characterized by low volume and low capacity. Recent reforms have begun to establish a sound framework of laws, which, if implemented, may form an adequate foundation for effective and transparent commercial dispute resolution. At this point, however, the courts have heard very few commercial cases (and relatively few civil cases generally) and almost none involving significant foreign transactions. Laos' court administration is significantly impaired by a lack of resources and a lack of well-trained staff. Although some courts have stand-alone computers, the case management system, docketing, record keeping, and decisions are all performed by hand. Court records are technically public, but are generally unavailable to anyone other than the immediate parties to a dispute. In many cases, relevant departments such as the Ministry of Justice reported difficulties in obtaining judgments or other documents to execute their functions. This difficulty reflects a record keeping system that is based on handwritten ledgers and in which many court decisions are not intended to be kept after the conclusion of a proceeding.

B. Legal Framework

As detailed in the previous chapter, Laos has a **four-tiered court system** comprised of approximately 140 District Courts⁴⁶, 18 Provincial Courts, three Appeals Courts, and one Supreme Court. The District and Provincial courts serve as courts of first instance, with the Provincial courts reserved for larger first instance disputes. The Provincial Courts are also authorized to hear appeals of District Court decision. Each civil case is heard by a panel of three judges.

Following a round of judicial reform in 2003, each of the Provincial, Appeals, and Supreme Courts has five chambers, including Criminal, Family, Juvenile, Civil, and Commercial divisions. At the moment, however, these are notional divisions, as there are not enough judges to fully staff separate chambers, and judges are generally assigned to cases ad hoc based on their availability and relevant expertise. The 2003 Constitutional revision also limited the Supreme Court to ruling on matters of law, and took other measures intended to make the courts more independent.

The **Law on Civil Procedure** (No. 35/PDR (2004)) contains additional details regarding the jurisdiction and procedures for hearing commercial cases. The jurisdiction of the Civil Division includes "Cases relating to civil relationships, such as the violation of contracts other than commercial contracts." (Article 45) Somewhat redundantly, the Law on Civil Procedure also sets out a separate jurisdiction for the Commercial Chamber:

⁴⁶ In practice there are far fewer District Courts due to a lack of judges. Only 54 of 141 district courts are currently established, which according to a 2003 UNDP report, "has necessitated the clustering of courts...greatly inconveniencing litigants and discouraging parties from asserting their rights in courts." UNDP, Evaluation of the Implementation of the Rule of Law in Lao PDR 1997-2003 (2003).

Article 48. Jurisdiction of the Commercial Chamber

The commercial chamber has jurisdiction to decide:

1. Cases relating to business or commercial [disputes];
2. Cases relating to business or commercial contracts, or commercial documents such as promissory notes, bills of exchange, cheques and other documents;
3. Cases relating to commercial loan agreements;
4. Cases relating to enterprise bankruptcy and liquidation;
5. Cases relating to business or commercial relationships in connection with the import or export of goods, transportation of goods, insurance, banking and financial services, marketing [services], and agency;
6. Cases which the Office of Economic Dispute Resolution has sent to a court for enforcement;
7. Cases relating to violation of copyright and trademarks; [and]
8. Other cases relating to business and commercial relationships.

Article 49. Proceedings of the Commercial Chamber

Only the provincial and city people's courts have the right to consider a commercial case as a court of first instance.

The commercial chamber must make a proper, prompt and fair consideration and decision of the case to ensure efficiency and to ensure that no [delay] is caused to business operations.

The information of individuals, organizations and enterprises participating in the commercial proceedings should be kept confidential.

Proceedings in a commercial case must be conducted in compliance with business, commercial and other laws, as well as domestic and international commercial practices.

In addition to the principles mentioned above, the commercial chamber must apply the general principles relating to civil procedure.

The **administration of the courts** is controlled by The People's Supreme Court, which “manages the administration of all people’s courts and the military courts.”⁴⁷ Each chamber is supported by clerks who manage the docketing, scheduling, taking of summary minutes, and filing. Case records are required to be kept for the duration of a case, but the regulations are unclear as to retention of records after a case is closed. According to parties and court personnel interviewed, case files are often discarded at the close of a case, and in any event are not easily accessible to third parties.

⁴⁷ Article 13 of the Law on the People’s Courts of 23 October 2003.

The **Law on Judgment Enforcement** (No. 03/NA, 15 May 2004) establishes a separate office of judgment collection at the Ministry of Justice, which is responsible for enforcing all civil judgments. Documentation regarding binding final judgments is sent to the enforcement office, which summons the litigants and arranges for and certifies the transfer of property of funds. In the event of non-compliance, Article 28 of the law empowers “enforcement offices or units are entitled to issue orders to bring, seize, escort, move, fine or attach assets and to issue such other instructions” to recover the debt. Despite clear detail in the law, however, officials of the judgment enforcement office and litigants alike complain that implementation is problematic and actual enforcement of judgments is extremely low.

The **Law on Court Fees** (No. 05/90/PSA (2002)) establishes a clear system of court costs and collections. Civil parties are charged relatively small filing fees – from \$1 to \$10 on a sliding scale based on the value of the petition. Parties also bear the relatively small cost of files and photocopies of court records relating to their case. Civil judgments are also taxed upon enforcement at two percent of the value of the judgment, but not to exceed \$10. Among other things, these small fee caps reflect the generally small value of commercial court disputes that reach the Lao courts. The Law on Court Fees also provides for civil parties to pay for expenses made for premises inspection; searching for a defendant; and for enforcing a court decision. The losing party then ultimately pays all court fees.

In addition to the commercial divisions of the courts, commercial matters may be resolved by **official mediation**. The office of economic dispute resolution in the Ministry of Justice is often the first resort of parties wishing to resolve a commercial dispute. There are also proposals to establish a commercial arbitration law, but no draft was available at the time of writing.

The Civil Procedure Code also provides for **mediation** of small commercial matters at the village level:

Article 79. Mediation

Small disputes or disputes which are not of high value such as family disputes, disputes relating to the possession of animals, rights of way and other [disputes] must be settled by the village mediation unit. If the litigants cannot reach a settlement, the justice office of the district must educate, encourage reconciliation, and mediate between the litigants once again, based on the regulations of the village mediation unit and district justice office. In the event that the justice office of the district is unable to mediate such dispute, the dispute may be brought to a court for adjudication in accordance with the laws if a claim is filed. When a court receives a claim, the judicial tribunal may mediate between the litigants again.

In the event that a dispute involves a high amount, the litigants have the right to request mediation as described in the preceding paragraph or can submit a claim to a court directly.

A mediation may be conducted if it does not affect peace and social order.

Article 80. Results of Mediation

When the litigants reach a settlement as a result of mediation, the village mediation unit or the district justice office must make a memorandum and the litigants must sign and affix their thumb prints to it in order to evidence [their agreement]. The memorandum of mediation shall become effective from the date it is signed.

In the case of mediation by the court, the mediation settlement shall be effective and enforceable as a final decision of the court. The order for execution of the mediation settlement must be made within five days from the date of the mediation.

The court shall not reconsider a case that it has mediated.

While the few laws that govern administration of the courts are of generally high quality, there is a significant problem throughout the country of inadequate access to legal texts and information. Laws are seldom available to anyone but practitioners, and often the content and status of draft laws is kept from public or even professional view.

C. Implementing Institutions

A lack of sound implementing institutions thoroughly undermines the effective functioning of the Lao court system. The **courts** themselves are understaffed, under-trained, and under-resourced. Although there are many earnest and energetic participants in the court system, they are all hampered by lack of access to basic information and tools to perform judicial functions beyond the most basic commercial disputes.

The lack of legal depth is complimented by a lack of legal breadth. There are very few **lawyers** country wide – with only 69 members of the bar association, most of whom practice in Vientiane – and there is limited training in commercial matters or sophisticated litigation techniques.

Among the shortfalls of the judicial system, the lack of effective or efficient judgment enforcement was the most cited weakness. According to the **Office of Judgment Enforcement** at the Ministry of Justice, only about 30 percent of judgments they seek enforcement are collected. As a result, business people and banks state uniformly that they do not look to the courts for relief; whatever recovery they get through the legal system is a welcome bonus.

In addition, the court system suffers from a comprehensive **lack of transparent information**. The Diagnostic team was only able to access courts in Vientiane, which would have far greater resources than any of the provincial courts, and even there we saw few computers and no automated docketing or filing system. All court records are kept by hand in ledgers; court minutes are handwritten summaries taken by clerks; and case files are not centrally kept after the close of a case. Judgments, while technically “public” are never published and are rarely available to anyone but the immediate parties to a dispute. Thus, even if the court does reach a satisfactory result, there is little way for businesses to learn or take comfort from the decision and thus is perpetuated a negative image of the courts.

D. Supporting Institutions

The low level of legal activity in Laos is mirrored by weak supporting institutions. The **Council of Jurists** is responsible for overall regulation of the judiciary, but is a politically controlled entity whose influence on progressive reforms was not evident in the Diagnostic. More impressive was the working group organized around the foreign affairs department of the Ministry of Justice, which has been spearheading a Master Development Plan for the legal sector that anticipates activities through the year 2020. This plan is also supported by the Japanese.

Laos has one of the lowest lawyer populations in the world, with an estimated 70 lawyers serving a population of approximately 4.5 million. The legal profession is organized around a **Lao Bar Association**, but its impact on the legal profession appeared minimal. A law career did not appear to be one of high prestige, and lawyers are not necessarily seen as integral to the dispute resolution system, which tends toward informal and meditative measures within communities. Thus there may be a limited talent pool flowing into the system that would enable and encourage reform.

There is one **Faculty of Law** in Vientiane, but its resources and curriculum are severely limited, particularly when it comes to commercial matters. According to professors, contracts and commercial law are taught as part of the basic curriculum, but the impression made on the Diagnostic team was that only the most basic aspects of these topics would be covered in the undergraduate program. There are a huge number of students in the law faculty relative to the 70 or so lawyers and less than 200 judges in the country.

The legal sector has been the focus of significant **donor** attention. UNDP has played a coordinating role and maintains an active judicial assistance program that includes training of judges and court personnel, technical assistance with relevant legislation, and translation of laws into English. JICA has also given significant assistance to the Ministry of Justice in the commercial law sector. It is just concluding a three year project that involved drafting a commercial and civil code along with explanatory texts. JICA has also focused on translating and disseminating laws to local stakeholders in the judicial process. Also, the Asian Development Bank has been involved in training judges specifically in commercial matters to increase the capacity of judges serving in the commercial chambers.

E. Social Dynamics

Despite uniform criticisms of the slow and ineffectual nature of the courts, the Diagnostic team did not discern a great demand for legal reform. This may be due in part to the controlled nature of public discourse within Laos. Legal cases are rarely covered in the state-controlled media, and dissent about government performance is not encouraged. But it also reflected businesses' familiar reliance on self-help remedies. On the other hand, reforms are occurring slowly but steadily. The government appears committed to progress in terms of the number of laws it passes and ensuring that they are of international quality.

It is notable that corruption, while acknowledged as existing, was not cited as a major impediment to judicial functioning. This may have more to do with the small size of commercial disputes that go to court, but is a positive sign that it may be kept in check as the courts expand.

Another positive trend in commercial dispute resolution is the public's embracing of mediation and arbitration as the primary forms of economic dispute resolution. When this works, it is faster, cheaper, and more amicable than a formal court process. The problem is that in Laos when it doesn't, then parties to a dispute have no effective recourse they can rely on to deliver resolution any time soon. This is probably more tolerable in the Laotian business culture than most other places in the region, but acts as a significant deterrent to more aggressive and profitable business ventures.

F. Recommendations

- Establish a legal database of laws, codes and court decisions that is published and readily available to all stakeholders in the legal system.
- Concentrate on developing judicial training modules that increase capacity to understand more complex commercial disputes.
- Increase the technical capacity of the economic arbitration unit within the commercial dispute resolution process as an alternative to the currently slow and ineffective courts.
- Centralize capacity for complex economic dispute resolution in a few commercial courts – perhaps one of first instance in each of the three regions hosting appellate court – rather than spread scarce resources across commercial chambers in a multitude of Provincial courts.

X. Foreign Direct Investment

A. Introduction

Considerable institutional reform must take place in Laos before it will be a competitive destination for foreign investment in Southeast Asia. To a certain extent, a handful of recent large-scale investments in the hydroelectricity and mining sectors has enhanced the capacity of Laos to manage the interests of outside investors. Investment on a small or medium-scale basis, however, remains overwhelmingly discouraged by lengthy, non-transparent bureaucratic processes; inadequate human resources; a weak national infrastructure; a negligible domestic market; and an unreliable legal system. In short, there is little sense at this time that the possible rewards derived from investing in Laos, other than at the highest scale or in certain niche markets, can overcome the considerable risk.

B. Legal Framework

In recent years, Laos has made some progress toward strengthening its laws, regulations, and standing in the world trade regime, although it remains well behind other countries in the region.

Laos has re-vamped its Law on Promotion of Foreign Investment and its Customs Law; enacted certain relevant implementing decrees; joined the Association of Southeast Asian Nations (ASEAN) and subscribed to its supporting infrastructure, including the ASEAN Free Trade Area (AFTA) and the ASEAN Investment Area (AIA); initiated its application for membership in the World Trade Organization; maintained bi-lateral trading agreements with a variety of partners; and entered into a bi-lateral trading agreement with United States. This section describes Laos' general domestic law framework in support of foreign investment. The chapter on International Trade Law and Policy summarizes its international commitments.

The Law on Promotion of Foreign Investment (October 22, 2004). Ten years after it enacted its first “Law on Promotion and Management of Foreign Investment,” the National Assembly of Laos adopted a new statute for the purpose of, among other goals, “contribut[ing] to gradually improving the people's living conditions, and . . . strengthen[ing] and . . . develop[ing] the country” (Article 1). Unfortunately, this Law is not yet readily available over the Internet – most sources continue to cite to its predecessor. The new Foreign Investment Law reinforces the protections afforded investors against government confiscation, seizure or nationalization without compensation (Articles 4). It also promises freedom from government interference in

Comparing Laos to the World: The Rankings that Foreign Investors Notice

Ease of doing business
World Bank *Doing Business in 2006*
147 out of 155

Economic Freedom
Heritage Foundation
Index of Economic Freedom 2006
149 out of 157

Corruption
Transparency International
Corruption Perceptions Index (2005)
77 out of 158

GDP per capita (purchasing power
parity)(\$1,700)
CIA World Factbook (2004)
184 out of 231

operations and the rights to lease land, transfer leasehold interests, improve land and buildings, and repatriate earnings (Article 12).

Articles 5-8 of the Law provide for three forms of foreign direct investment:

- a) *Business Cooperation by Contract (BCC)*. This type of arrangement allows for an arrangement between domestic and foreign legal entities without establishing a new legal entity in Laos. This type of arrangement, which was not available before the new Law, may allow certain foreign investors to cooperate with domestic businesses through a less bureaucratically cumbersome method than that involved with setting up a new company. The BCC may be an advantageous route of investment for service providers in particular, such as foreign tourism firms that seek to take advantage of existing domestic service-providers.
- b) *A joint venture with one or more domestic Lao investors*. In this model, the foreign equity may not be less than 30% of the total investment capital. Joint ventures can be used for large and small investments.
- c) *A 100% foreign-owned enterprise*. This form of enterprise is undertaken by a foreign investor only. Such an enterprise may be incorporated as a new legal entity or as a branch of a foreign investment enterprise.

In addition, the Foreign Investment Law states that investors will not be charged import duties on production vehicles, machinery, equipment and raw materials or export duties on finished products (Article 18). Investor's profit tax is classified into three groups: 20%, 15% and 10% (Article 17 and 18). Profit tax exemptions are offered for certain extended periods depending on activities, investment areas and size of investment:

- a) Zone One (area with no economic information infrastructure):
7 years profit tax exemption; thereafter a profit tax of 10%
- b) Zone Two (areas with certain level of economic infrastructure):
5 years profit tax exemption; 3 years profit tax of 7.5%; thereafter a profit tax of 15%
- c) Zone Three (areas with good infrastructure):
2 years profit tax exemption; 2 years profit tax of 10%; thereafter a profit tax of 20%

With respect to employing foreigners, Article 12 of Laos' Foreign Investment Law allows up to 10% of a foreign investor's workforce to consist of foreign employees. (This number contrasts favorably with Vietnam's effective limitation of a foreign staff presence to 5%, yet unfavorably to Cambodia's laws, which allow any number of foreign employees so long as they qualify as key personnel, and even non-key workers if equivalent Cambodian labor is not available.)

Before commencing any activity in Laos, a foreign investment project must obtain a Foreign Investment License. Once such a license is obtained, the legal and regulatory framework for moving forward is complex and opaque, as further detailed below.

Law on Enterprise (August 13, 1994). Article 20 of the Law on Promotion of Foreign Investment contemplates that a single agency will act as a “one-stop shop” for foreign investor licensing, business registration, and tax registration. That full-service function does not yet exist in practice, however, so all foreign companies in Laos must now register with the Company Registry of the Ministry of Commerce, as further detailed in this Report’s chapter on Company Law. That law, unfortunately, does not prescribe the process for forming a new company; rather, registration is a matter of largely unwritten practice that has been developed throughout the various State, provincial and district bodies where various approvals are required. The Company Law says that establishment of a company requires application to all concerned government sectors and “shall be separately determined” by them, and that when an application is made to any particular sector it must “respond within 60 days from the date the application is received” (Article 16, paragraph 2). The Law also states that a company “shall be considered as lawfully established only when properly registered as an enterprise” (Article 16 paragraph 3) – a point in time which often requires the prior approval of an uncertain number of sectors. In short, even to the extent that the licensing procedure for foreign investment has been streamlined, the process of becoming legally established remains clogged by unnecessary and duplicative bureaucratic procedures.

Additional Key Issues in the Legal Framework.

- ***Tax.*** The Laos tax law, last updated in 1995 and of key interest to investors, is not readily available over the Internet. Under the Law, all business enterprises in Laos must register with the Tax Department of the Ministry of Finance. Generally, corporate income tax on profits is a flat and relatively favorable 20 percent, while personal income tax is a flat 10 percent of earnings. Although businesses report fairly routine and consistent methods of collecting sales tax and employer’s withholding of employee taxes, difficulties arise on an annual basis when profit taxes are calculated. The Lao government does not fairly account for deduction of routine business expenses from its determination of corporate profits, and there is little to no opportunity to contest tax-related decisions.
- ***Licensing.*** Before a foreign investment company is fully authorized to carry on business, it will often need an array of additional licenses and permits, depending on the type of business to be carried out.
- ***Land Law.*** Foreigners are prohibited from owning land in Laos, as detailed in this Report’s chapter on Real Property Law. As that chapter elaborates, however, “there is an active although complicated market in both commercial and residential properties” for foreigners, for whom the law affords a number of long-term alternatives to land ownership.
- ***Labor Law.*** The Labor Law in Laos, enacted in 1994, does not support to a significant degree the notion of “at will” employment, that is, the right of employers to “hire and fire” employees according to the business needs of the enterprise, or for no reason at all.

Rather, once an employee has worked beyond the duration of an initial definite-term contract, dismissal can take place only “for cause” – that is, the employee’s action must fall within an enumerated list of actions that warrant dismissal. Employees must be provided with 45 days notice prior to severance of their contracts. The law also compels a rigorous set of formalities pertaining to employee discipline prior to dismissal. Foreign employers find that these restrictions greatly interfere with their business flexibility and their ability to enforce their own set of employment standards.

- *Customs Law.* As detailed in this Report’s chapter on Flows of Goods and Services, the passage of a new Customs Law on May 20, 2005 may bode well for the trading interests of foreign investors. The ultimate success of this Law in improving trade facilitation depends upon the final language of the implementing decrees that are currently being drafted and negotiated by the Laos Customs Authority.
- *Technology transfer.* In light of the Government’s interest in promoting foreign investment, it has acknowledged the need to have a decree on technology transfer. The European Union is assisting in the development of this Decree.
- *Dispute Resolution.* Significantly, Laos is not among the 143 states in the world that have ratified or entered into force the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

C. Implementing Institutions

Oversight of foreign investment policy takes place within the **Committee for Promotion and Management of Investment**, a so-called “super ministry” that is chaired by the Deputy Prime Minister. Pursuant to the Law on Promotion of Foreign Investment, the CPMI is supposed to operate as a “one stop shop” that provides not only a foreign investment license, but also an enterprise registration certificate, a tax registration certificate. Since 1994, Laos has granted more than 1000 licenses to foreign investors representing 36 different countries. Licenses have been granted in 13 sectors, with the largest investments taking place in the energy, mining, industrial, and agricultural sectors.

Situated within the CPMI, the **Department of Foreign and Domestic Investment (DFFI)**⁴⁸ is charged with promoting foreign investment and managing applications for foreign investment licenses. DFFI maintains a web site at <http://invest.laopdr.org> which provides some straightforward explanations of the process of obtaining an investment license, general information about the comparative and competitive advantages of doing business in Laos, and a list from 2003 of businesses that are interested in foreign investment. The DFFI site does not, however, deliver the links to key laws that it promises, including the Enterprise Law, the Tax Law, and the Labour Law.

Foreign investors will necessarily find that various **local administrative agencies** have an interest in their activities. For example, Village leaders expect that new businesses in their villages will present their licenses and documents to their offices. In fact, Village leaders

⁴⁸ The DFFI is an offspring of the country’s Foreign Investment Management Committee, created by decree in 1989 to centralize foreign investment approval procedures.

themselves claim to issue licenses for small foreign investment. To obtain such a license, an investor must prove what kind of business it is in, and show proof that all licenses have been obtained.

Although the team did not meet with the **Office of the Prime Minister** in Laos, it was clear from interviews with a variety of organizations that this office holds considerable authority with respect to: (1) the promotion of investment-related legislative initiatives; (2) the development of laws and regulations; and (3) access to information and results for those foreign investors with significant economic “clout.”

To a certain extent, Lao **courts** and the **Economic Arbitration Board** play an implementing role in the experience of foreign investors, but reports about their competence are generally negative. Foreign lawyers encourage foreign investors to avoid the courts entirely by including private arbitration clauses in their contracts so that all disputes flow to an international arbitration authority, rather than to the Lao bodies. With respect to Intellectual Property, although a few judges have received training in this area, most commercial chamber judges fundamentally lack facility with IPR matters and continue to need significant training, regulatory guidance, and mentoring in this area.

D. Supporting Institutions

There is a small but growing network of institutions that provide some support for foreign investors in Laos. The supporting environment is distorted, however, by the heavy presence of donors and large investors, as well as by national prohibitions against non-government organizations and by the extreme weakness of institutions that support the development of human resources at the most basic levels. Moreover, the absence of a free press in Laos stunts the development of resources that are important to foreign investors, such as reliable information and a professional community that is capable of critiquing and analyzing the actions of its Government.

First, the **donor community** plays an enormously important role in Laos, one that is critical in terms of supporting the future structure of commercial legal and institutional reform in the country. Laos is part of the **Integrated Framework**, a multi-donor, multi-agency initiative that assists Least Developed Countries in their efforts to expand their participation in the global economy through, among other strategies, leveraging donor assistance that is available. Although the IF has been slow to take root in Laos, there have been steps recently to improve its effectiveness, including a strategy workshop in March 2006. If a facilitator among the donors finally emerges – and Australia is said to be stepping into this role soon – the effectiveness of donor work may be strengthened greatly.

The major multilateral donors in Laos include the **Asian Development Bank**, the **World Bank**, the **European Union**, and the **United Nations Development Program**. In addition, many individual countries engage in direct support of the development of economic institutions in Laos, including **Australia**, **Japan**, **Sweden**, **France**, and **Canada**. These groups have been at the heart of significant shifts in the commercial legal environment for investors, including reforms in the banking sector, the development of a secured transactions law, the creation of a new system

of commercial courts, and the implementation of new laws through opportunities in training and institutional capacity building. Technical assistance provided by donors will also help Laos increase its readiness for accession to the World Trade Organization.

That said, observers comment that the Lao Government has become *overly* dependant on donors, relying too heavily the initiatives driven by these groups at the expense of internally generating ideas, priorities and input. In addition, although coordination among the donors themselves is said to have improved significantly in recent years, the Lao Government itself is not engaged to a meaningful degree in managing and coordinating the input of donors. Moreover, the Lao government is said to “treat foreign investors too much like donors” – meaning that it does not exhibit any sense of urgency with respect to responding to foreign investors, given its experience that the donor community has exhibited great patience with the bureaucracy in the past.

On the other hand, among the most significant supporting institutions in support of foreign direct investment at this time are the **large investors**. Through just a few “big-ticket projects” – chiefly the development of mines and dams that represent investments in the hundreds of millions of dollars – the Lao government has found itself having to respond to the individuals and institutions that are promising to bring great returns to the country, so long as the legal and institutional environment is in place sufficiently to do so. The **Nam Theun 2** project in particular promises enormous rewards for Laos. A dam-building project worth \$1.4 billion – and promising income to the country of \$100,000 million annually after the dam is completed in 2009 – the project has four major investors (including 35% ownership by the State) and carries critical guarantees and oversight functions by the World Bank and the Asian Development Bank. The project represents the largest investment in the country ever, and has required Lao officials in many different branches of Government to respond with greater urgency and thoroughness than they have been accustomed to in the past. This project may significantly influence the growth of other foreign investment in the future, depending on its success.

Significant but largely **informal agricultural investment** from Chinese interests is taking place in various parts of the country, mainly in the north. Many observers voiced concern that these investors neither comply with registration and licensing requirements, nor avail themselves at all of legal institutions in the country, such as lawyers and courts.

Although there is not yet a large network of **business support services**, the number of private companies sufficiently armed with “Western credentials” and available to provide business advisory services, tax and legal advice, human resources support, financial advisory services, and business and technology services is about adequate for the current level of demand.

The **United States Commercial Service** provides a useful guide to commercial investment in Laos. Although the U.N. Agency for Trade and Development has begun creating investment guides for least developed countries in the region, it has not yet developed such a guide for Laos.

The **Lao National Chamber of Commerce and Industry** was established in January 1990 to assist in attracting new business ventures. Foreign businesses may apply for membership in the Chamber of Commerce. The LNCCI is the most visible association serving the private sector. Previously part of the Ministry of Commerce, in 2000 it was established as an independent body.

Although still loosely supervised by that ministry, it is financially independent, supported by membership fees of \$20 per year and fees associated with issuance of Certificates of origin for Lao export goods. About 100 of the latter are issued per month, at a fee of about \$1. Currently LNCCI has about 800 members, comprised of mostly firms with direct foreign investment in the country. As a result, about 50% of its members are involved in international trade. Membership represents no more than 10% of current private enterprises, however. The institutional framework for the organization is broken down into between 15 and 20 business groupings such as handicrafts, textile and garment producers, food stuff and consumer goods to promote dialog within the sector to identify common issues. The garment producers are heavily represented.

LNCCI's principal role is one of advocacy for the private sector, serving as the link between business and the various governmental institutions regulating commerce to expand business opportunities, and increase the member's competitive position in the regional and global marketplace. The organization reviews drafts of all commercial related laws and regulations, conducts direct dialog with ministries through its industrial sectors, and sits as charter members on governmental committees formed with trade representation.

Although there are increasing opportunities for the development of human resources in Laos, the state of **primary, secondary and higher education** in Laos remains well beneath the needs of the country. As discussed in this reports chapter on Commercial Dispute Resolution, the state of legal education is very poor. Various students and professionals have access to such opportunities as scholarships, study tours, and short and long-term training programs, but the needs remain enormous.

Because the traditional **media** sources in Laos are entirely controlled by the State, the populous is being underserved in terms of new ideas and critical analysis. The **Internet**, however, is not censored, so the gradual increase in its use could act as a significant stimulant to societal discourse.

E. Social Dynamics

Demand for meaningful change in the foreign investment environment in Laos is low. Legal and institutional reform is largely driven by donors and large investors. The ruling party, it is said, is interested almost exclusively in maintaining its own power, and it therefore indulges these outside actors only insofar as they support this underlying priority. There is significant suspicion of foreigners and the literacy and capability of the majority of the population is so low that opportunities are rarely seized in a way that leads to meaningful growth or change.

Laos is surrounded by four enormously dynamic countries – China, Vietnam, Thailand, and Cambodia. Laos is positively distinguishable in this crowd only for a very few things, namely its natural resources and its easy-going, relatively clean environment. A regional approach to technical assistance may prove useful in Laos, however. Namely, a greater inclination to be responsive may be exhibited where the regional peers of Laotian professionals are showing interest and engagement.

Another “regional opportunity” exists with respect to regional investors – that is, the relative absence of regional investment. Almost no foreign investment flows to Laos from Cambodia and Vietnam, for example.

The terribly low *per capita* income in Laos, as well as its relatively small population and the limitations of its infrastructure, means that Laos will not be regarded as a significant market in the region for the foreseeable future. Thus, foreign investors will come to Laos in search of resources and raw materials, perhaps, but not for consumers of the goods or services they produce.

The decentralization of government services in Laos – for example, there are several different customs services, and many government branches are largely autonomous in the provinces – makes FDI in Laos confusing and difficult to navigate and track.

The fact that very little money flows through Laos at this time may be responsible for the relative dearth of complaints about corruption in the country. That said, the ever-present expectation of gifts for bureaucrats – often termed “coffee money” – may become more of a problem as more capital flows into the country. The World Bank’s controls on income from the Nam Theun 2 project will be enormously important in terms of directing the fruits of foreign investment into positive results that help the entire country, as opposed to a privileged few.

F. Recommendations

In light of the above, this Report makes the following recommendations:

- Simple enhancements to the Department of Domestic and Foreign Investment’s website would improve the country’s image as a country that is “open for business.” For example, the DDFI should provide links in English to all laws, decrees and regulations that may be of interest to a foreign investor.
- Efforts to strengthen the Integrated Framework, as a means of hastening and improving coordination of commercial reforms, should continue. The wide variety of FDI-related donor initiatives should be continuously catalogued, monitored, coordinated, and leveraged.
- For the benefit of foreign investors, the sub-group of laws, regulations, and court decisions that specifically pertain to commercial matters must be catalogued, translated, and placed on-line.
- Programs on corporate governance, with an emphasis on attracting foreign capital, should be directed toward Laos’ small and mid-size domestic firms.
- Regional programs, in which officials from Laos are encouraged to work with their foreign investment counterparts from Vietnam, Thailand, and Cambodia, should be encouraged.

XI. International Trade Law and Policy

A. Introduction

Laos' primary exports are garments, wood products, coffee, electricity, and tin. Its exports were valued at \$379 million in 2005, while its imports were valued at \$541 million.⁴⁹ Clearly, the country's trade deficit needs remedying, particularly in a region where exports represent a critical component of economic development.

As one component of its National Growth and Poverty Eradication Strategy, Laos is working toward a liberalized trade environment. The country remains significantly behind its neighbors, however. Existing trade agreements, including the ASEAN Free Trade Agreement and the new bi-lateral trade agreement Laos holds with the United States, require a bolstering of efforts to meet the country's commitments, including implementation of reforms in the areas of customs, intellectual property, and trade facilitation. In addition, the ambiguity of Laos' legal and regulatory structure will need to be remedied before a legislative plan can be established and thereafter pave the way toward WTO accession.

B. Legal Framework

Despite the insularity of its government, Laos has taken steps in recent years toward developing a national trade policy that looks outward toward accessing bi-lateral, regional and multi-lateral trading opportunities.⁵⁰ Laos joined the Association of Southeast Asian Nations (ASEAN) and subscribed to its supporting infrastructure, including the ASEAN Free Trade Area (AFTA), the ASEAN Investment Area (AIA), and the Vientiane Action Plan; initiated its application for membership in the World Trade Organization; maintained bi-lateral trading agreements with a variety of partners; and entered into a bi-lateral trading agreement with United States.

Bi-lateral trade. Laos reportedly has 16 bilateral trade agreements, although locating a definitive list of those agreements has proven futile. Of Laos' \$379 million in exports in 2004, approximately 19.3% traveled to Thailand; 13.4% to Vietnam 13.4%; 8% to France 8%; 5.3% to Germany 5.3%; and 5% to the United Kingdom.⁵¹ Laos does not have a BTA with the European Union. As detailed in this Report's chapter on Trade in Goods and Services, a number of agreements with regional partners, including bilateral agreements with Vietnam and Thailand and 20 annexes and protocols on cross-border trade under the Greater Mekong Sub-region structure, aim to facilitate cross-border trade and to improve the competitive position of Lao transport industry. Full implementation of regional agreements should greatly reduce the time it takes to move a shipment across regional borders.

A bilateral trade agreement with the United States came into effect on February 4, 2005, following the completion of domestic ratification procedures. The BTA normalized trade

⁴⁹ CIA Factbook (2006).

⁵⁰ The World Bank will soon publish a Diagnostic Trade Integration Study which provides extensive detail on the legal framework for trade in Laos, as well as other issues in trade policy and trade facilitation.

⁵¹ CIA Factbook (2006).

relations between the two countries and extended normal trade relations (NTR) status from the United States to products from Laos. In turn, Laos agreed to implement a variety of trade reforms, including NTR and national treatment of products from the United States, transparency in rule making, establishment of a regime to protect intellectual property rights, and implementation of WTO-level customs regulation.

From both ends, the results of the BTA between the U.S. and Laos have been underwhelming. Compliance on the part of Laos has been weak, particularly with respect to implementing the changes in customs treatment and improving transparency. And, in contrast to the U.S. BTA with Vietnam, which produced a remarkable increase in the quantity of goods exported from Vietnam to the U.S., the results of this new agreement are disappointing to Laos – the country has seen been no meaningful increase in trade since the enactment of the agreement.

Yet this disappointment is instructive, because Laos has also proven less engaged in the actual implementation of the process. Significantly, the strong motivation shown in Vietnam for implementation of the BTA can be attributed in great measure to the highly successful USAID-funded Support for Trade Acceleration (STAR) project, which has been heavily engaged in implementation of the BTA in virtually every area of interest to commercial legal and institutional reform, as it pertains to trade. Technical assistance from the United States to Vietnam includes legal and economic analysis and recommendations regarding changes in the laws and policies needed to comply with the BTA and, as relevant, with related WTO requirements and international best practices; training workshops and policy seminars to advance understanding of the technical issues underpinning such changes, to build public support for such reforms, and to help train those involved in implementation of the Agreement; study tours carefully targeted to advance priority reforms; and publication and translation of key reference materials. Implementation of the U.S.-Laos BTA would greatly benefit from similarly comprehensive support, whether from the U.S. or another donor.

Regional trade. ASEAN was established in August 1967 in Bangkok by five original member countries, namely, Indonesia, Malaysia, Philippines, Singapore, and Thailand. Brunei Darussalam joined on January 8, 1984; Vietnam joined on July 28, 1995; Laos and Myanmar joined on July 23, 1997; and Cambodia joined on April 30, 1999. The 10 member countries of ASEAN have a total population of around 550 million and a GDP of over \$700 billion.

The ASEAN Free-Trade Area (AFTA), first launched in 1992, now covers all ASEAN member countries and has resulted in the reduction of tariffs for over 4000 categories of products since 2000. The ASEAN Common Effective Preferential Tariff Scheme (CEPT) has proven difficult to implement;⁵² nonetheless, members remain committed to its continued use. The CEPT scheme covers nearly 98% of all tariff lines in ASEAN and contemplates that tariffs among ASEAN countries will be in the 0-5% range. The only products not included in the CEPT scheme will be those in a General Exceptions category and sensitive agricultural products. Over the course of several years, ASEAN's initial program of tariff reductions has accelerated and broadened to include other "AFTA Plus" activities. These include efforts to eliminate non-tariff barriers, harmonization of customs nomenclature, valuation, and procedures and development of common

⁵² Id.

product certification standards, among others. Although the original ASEAN members have a faster time-table than its newer members, Laos has committed to CEPT implementation by 2008.⁵³

Market-broadening opportunities afforded through ASEAN include the China-ASEAN Free Trade Area, the Trans-Regional EU-ASEAN Trade Initiative (TREATI), and a possible India-ASEAN Free Trade Area, currently under negotiation. The significance of these agreements is prospectively that of long-term growth in regional trade, thus diminishing regional dependence on U.S. and European markets.

In addition to ASEAN, the **Greater Mekong Sub-region (GMS)** is a regional initiative comprised of Cambodia, the People's Republic of China, Laos, Myanmar, Thailand, and Vietnam. In 1992, with the primary assistance of the Asian Development Bank, the six countries entered into a program of sub-regional economic cooperation, designed to enhance economic relations among the countries. The program has contributed to the development of infrastructure to enable the development and sharing of the resource base, and promote the freer flow of goods and people in the sub-region. It has also led to the international recognition of the Sub-region as a growth area.

Among the most significant contributions of the GMS is the Cross-Border Transport Agreement (GMS Agreement), a multilateral instrument for the facilitation of cross-border transport of goods and people. Formulated under the auspices of ADB technical assistance, the GMS Agreement provides a practical approach, in the short to medium-term, to streamline regulations and reduce nonphysical barriers in the GMS. It incorporates the principles of bilateral or multilateral action, and flexibility in recognition of differences in procedures in each of the GMS countries. The GMS Agreement includes references to existing international conventions that have demonstrated their usefulness in a broad range of countries. It also takes into account, and is consistent with, similar initiatives being undertaken by ASEAN.

The GMS Agreement covers the following:

- single-stop/single-window customs inspection
- cross-border movement of persons (i.e., visas for persons engaged in transport operations)
- transit traffic regimes, including exemptions from physical customs inspection, bond deposit, escort, and phytosanitary and veterinary inspection
- requirements that road vehicles will have to meet to be eligible for cross-border traffic
- exchange of commercial traffic rights
- infrastructure, including road and bridge design standards, road signs and signals.

WTO accession. Laos will be the last country among its immediate neighbors to join the WTO. Thailand joined in 1995. China joined in 2001. Cambodia joined in 2004. Vietnam expects to join in 2006. Laos remains a long way from accession, which will take place no earlier than 2010, it is commonly agreed.

⁵³ National Growth and Poverty Eradication Strategy, *supra* note 1, at 110.

Laos first applied for WTO membership in 1997 and the WTO established its Working Party for Laos in February 1998. A Memorandum on the Foreign Trade Regime was circulated in March 2001 and replies to questions from Members were submitted in October 2003. According to one observer, Laos “answered its questions, but not very well.” Another person explained that Laos was asked to provide data that would more effectively show support for assertions made in its responses.

The first Working Party meeting took place on October 28, 2004. Although the next Working Party was initially scheduled to take place in 2005 and then rescheduled for 2006, it will likely be delayed again so that the WTO can complete necessary actions pertaining to other countries that are closer to accession, such as Vietnam. According to current WTO documentation, outstanding issues include the following:

- Documentation on agriculture, services, SPS/TBT, and Intellectual Property;
- A legislative action plan;
- Further negotiations on goods, including a draft tariff schedule; and
- Further negotiations on services, including a draft services schedule.

So much needs to be done in terms of preparing for accession that priorities have yet to emerge. One critical area of weakness is that of Trade in Services. Through law or “unreviewable” administrative decisions, Laos currently prevents foreigners from participating in certain services, such as the practice of law and insurance. Even with a strong set of laws, the suspicion of foreigners may prevent trade in services in happening in meaningful practice.

As discussed earlier in this Report, another fundamental problem in Laos is that the **universe of law** pertaining to commercial matters is undefined and inaccessible to most parties, including Government ministries. For example, the Office of the Prime Minister enacts as many as 10 decrees each year, many covering topics of interest to the commercial and trading community, such as distribution of goods, management of import and exports, pricing of goods, taxes, intellectual property, state investments, and so forth. No public hearing is required to enact an ordinance. The drafting of decrees is typically delegated to line ministries by the Prime Minister’s Office. Although the Ministry of Justice plays a role in reviewing draft decrees and other regulations, it often does not receive a final copy. This absence of clarity, access and quality control in the formation of these and other sources of regulatory authority is a problem that constrains the ability of Laos to establish a comprehensive legislative agenda, as it is required to do in the WTO accession process.

Customs and tariffs. As detailed in this Report’s Chapter on the Flow of Goods and Services, Laos has recently enacted a new Customs Law that was prepared in conformity with WTO expectations, according to Ministry of Commerce officials. Implementing decrees have not yet been drafted, yet will be enormously important in terms of WTO conformity.

Trade remedies. Laos has not yet developed any trade remedy legislation.

Intellectual Property. At this time, IPR issues in Laos are addressed to a limited extent by a Government decree on copyright enacted in 1995 and a decree pertaining to patents enacted in

1992. Officials within Laos's Science, Technology and Environment Agency are mindful of the IPR-related obligations the country will assume under the WTO's agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). New legislation on IP matters is not yet a Government priority, although it is anticipated that any new legislations will incorporate the key principles of TRIPS.

C. Implementing Institutions

The decision to open Laos up to trade and other manifestations of foreign influence comes from the "top": namely, the **Lao People's Revolutionary Party, its leadership, and the Government and its leadership**. The absence of transparency in these issues is of critical concern to the outsiders seeking to assist Lao in liberalizing trade: "This country is run by 'invisible people,'" one European aid worker said.

Laos' WTO accession efforts are headed by a National Steering Committee which is headed by the Deputy Prime Minister. Various ministries, including the Ministry of Commerce and Ministry of Finance, are represented on the Committee. The Vice Minister of Commerce is the Secretariat to the Steering Committee.

The **Ministry of Commerce** is the principal ministerial authority in bilateral, regional and multilateral trade negotiations. The Ministry is entirely understaffed for the vast number of challenges it faces. At this time, the **Foreign Trade Department** employs 44 professionals, mostly economists (some of whom are studying abroad) and manages matters concerning trade law and policy. The Foreign Trade Department is currently divided into five divisions: (1) bilateral trade policy; (2) regional cooperation; (3) multilateral trade policy; (4) import and export; and (5) Generalized System of Preferences (GSP). The Ministry currently plans on dividing the Foreign Trade Department into two offices, with a new department specifically designated to handle the latter two issues.

The Foreign Trade Department comments on all new laws that are directly or indirectly related to trade in Laos, although the Department does not employ lawyers at this time. The capacity of people who "have the time and can comment" is limited, according to interviewees. The Department endeavors to ensure that all new laws are consistent with requirements of the WTO. The Department rarely has the expertise or opportunity to comment on ministerial decrees. The Department aspires to create a research arm that would help build capacity, knowledge and analysis.

A number of professionals working for the Foreign Trade Department have had the opportunity to train or study abroad. Examples of foreign study include short-term leadership programs at Harvard University, an internship at the WTO, and masters programs at universities in the United States. These opportunities take staff away from their full time jobs, but pay off significantly in terms of information, expertise, and networking.

The Ministry of Commerce also houses a **Trade Promotion Center**, staffed with 10-20 people.

In any country, the **Customs Agency** is often viewed as the “face” of a country’s commitment to trade – that is, the effectiveness and professionalism of its officers generally reveal whether trade is viewed by the State as an opportunity for economic development, or as a way-station for bureaucracy, political favoritism, or individual enrichment. At this time, the perception of Laos’ customs agency – notwithstanding a variety of legislative, regulatory, and implementing improvements – generally takes the latter view. A full chapter of this Report is devoted to the vast set of challenges facing Customs in Laos.

D. Supporting Institutions

The **European Union** is assisting Laos in developing a National Legislative Action plan for the purposes of meeting the minimum requirements for accession to the WTO. Activities within this process will include filling legislative and regulatory “gaps,” publishing laws, training judges, and other projects. The EU is also assisting Laos prepare for its second Working Party meeting at the WTO.

Many other **donors** are also assisting Laos in its efforts to liberalize its trade environment and, ultimately, join the WTO. Projects oriented toward legal reform, infrastructure development, and trade facilitation are supported by the World Bank, the UN Commission on Trade and Development, the Asian Development Bank, the Australian government, the New Zealand government, the German Government, and others.

Laos is part of the **Integrated Framework**, a multi-donor, multi-agency initiative that assists Least Developed Countries in their efforts to expand their participation in the global economy through, among other strategies, leveraging donor assistance that is available. Although the IF has been slow to take root in Laos, there have been steps recently to improve its effectiveness, including a strategy workshop in March 2006. If a facilitator among the donors finally emerges – and Australia is said to be stepping into this role soon – the effectiveness of donor work may be strengthened greatly.

With respect to intellectual property, representatives of “ECAP II,” the **EC-ASEAN Intellectual Property Rights Cooperation Program**, are providing some technical assistance in the effort to develop an effective new law. Advisors confront an almost overwhelming lack of understanding, however, about underlying IPR principles.

E. Social Dynamics

There is great ambivalence within the governing classes in Laos about accession to the WTO and participation in other trade agreements. The country demonstrates increasing awareness that trade liberalization is necessary for Laos to remain even remotely competitive, and the fact that Vietnam is heading toward WTO accession makes the idea more palatable. Laos’ secretive and insular rulers are simply not interested, however, in increasing the transparency of State institutions or sacrificing the controls they currently exercise over the private sector. The evident “foot dragging” in implementing reforms can be attributed at least in part to a growing awareness that trade liberalization may result in greater demands for political reform, which the country has managed to stifle for two generations. Also, the paucity of national industry reportedly makes the

country's rulers eager to protect what they do have from the competitive forces coming from across borders.

Gradually, the private sector has been allowed into the donor-driven process of legal reform. Although donors have always encouraged engagement of private sector concerns, official reluctance to incorporate the private sector has made this process very slow.

Laos' small trade community has expressed interest in getting help in export promotion, but is not yet finding meaningful support from the Government. It may be that the Government underestimates or does not understand the needs of Laos' smaller exporters, including garment, wood products, and handicraft producers.

As succinctly put in a recent East Asia Update by the World Bank, "Securing even a small share of a small niche of the U.S. European markets can have a substantial economic impact on a small developing country."⁵⁴ Yet the economic benefits of trade are not widely understood. The WTO accession process is envisioned to involve significant public education and consensus-building.

F. Recommendations

In light of the above, this Report makes the following recommendations:

- Lessons learned from the USAID/STAR program in Vietnam, particularly with respect to implementation of the BTA, should be analyzed for relevance and application to the U.S.-Laos BTA.
- The Ministry of Commerce should be singled out for technical assistance and capacity building, with special attention given by donors to coordination of assistance and leveraging of resources.
- The universe of law in Laos, including not only the "Kotmai," but also decrees, ordinances, regulations and the decisions of the Supreme Court and the appellate courts, must be published, catalogued, and placed in a central repository, both in hard copy and online, so that it is accessible to all interested parties.
- For the benefit of importers and exporters, the sub-group of laws, regulations, and court decisions that specifically pertain to trade must be catalogued, translated, and placed online.
- Where Laos is failing in its commitments to implement its BTA with the United States, it should act immediately to remedy these failings. Compliance with the BTA will be viewed by potential trading partners as a basis for whether to do business in Laos.
- With respect to technical assistance for trade, donors should engage in a coordinated plan for the most effective use of resources in the short, mid, and long-term.

⁵⁴ World Bank, East Asia Update, "Countering Global Shocks: What can East Asia Expect from the Doha Development Round?" (November 2005) at 25.

XII. Flow of Goods and Services

A. Introduction

Laos is moving forward with improvements to the flow of goods and services into and out of the country, yet enormous challenges remain. A new Customs Law was enacted on May 20, 2005. Though promising in scope, the ultimate success of this law will depend upon the language and implementation of the decrees that are now being drafted and negotiated by the Laos Customs Agency and other authorities. For legislative and regulatory reforms to be properly implemented, Customs *must* reorganize into a form that permits strong central control of revenues, employees and ports. Until centralization is realized, little more can be accomplished to enhance trade facilitation.

Furthermore, at this time, the trade community in Laos is generally not well served by either the public or private supporting institutions in Laos. Many problems arise because of lack of capacity of personnel in sectors, complicated and burdensome procedures, and the unavailability of quality transport and Customs clearance professionals. The Government has taken steps in recent years to address these issues and simplify procedures with some success. Strategic plans have been developed to strengthen the transport industry and to regulate the Customs brokers, but these plans often lack proper implementation at the provincial level where regulatory power is entrenched. Nonetheless, the trade community is slowly gaining some collective power to influence change in the service institutions. Transport costs have been reduced but still exceed those of neighboring countries. Significant reforms in the transport arena are long overdue.

B. Legal Framework

Laos' legal framework pertaining to trade in goods and services has a significant opportunity for improvement with the passage of a new Customs Law on May 20, 2005. However, the ultimate success of this law in improving trade facilitation depends upon the final language of the implementing decrees that are now being drafted and negotiated by Laos Customs. The Customs Agency expects the new decrees to be issued in May or June of 2006.

Legal Authority Supporting Trade Facilitation. For a truly facilitative environment, it is critical that the laws and regulations/decrees provide the following: (1) adequate and coherent authority structure for the essential trade-related institutions; (2) clearly stated regulations and procedures for implementing these authorities that strike an adequate balance between facilitation and necessary control; and (3) the means to legally employ modern risk management techniques utilizing selective inspections and post release audits to accomplish their respective missions.

Laos, however, is in the midst of formulating potentially significant changes to its practices with the passage of the new Customs Law. A degree of uncertainty is present because the final shape and effect of changes is not currently known, because critical areas are still being negotiated and prepared as implementing decrees.

The following are critical areas that are specified in the new law but must be further defined and expanded by official decree:

- **Customs organization.** The headquarters of the Laos Customs Agency does not exercise control over its field elements. Most other countries Customs services are organized with headquarters possessing line authority over their field elements. In Laos, however, responsibility for the hiring, discipline and retention of staff, budget allocation, payment of staff salaries and collection of duties and taxes are all performed by 16 provincial Customs offices. Additionally, the provincial offices retain part of the Customs collections for the benefit of the individual province. Collections for high-duty items such as vehicles remain in the coffers of the collecting province, although most of the goods move elsewhere in Laos. This situation causes a lack of uniformity for the trade community and fosters integrity problems by hindering anticorruption efforts.

A reading of an unofficial copy of the new Customs Law shows the differentiation of responsibilities and authority between Headquarters and the provinces remains unclear. The law is clearly compromise between central and administrative authorities. Negotiations between these groups are reportedly quite complicated and are taking longer than expected to produce the implementing decrees.

Further, an official Customs Plan reflects and emphasizes the goals of the new legislation:

Current efforts through the “monitoring and Control Program” need to be continued and strengthened. The detailed plan of action developed by the IMF in 2004 to create the national administration lays out a roadmap for the CD to evolve to a centrally managed organization, replacing the loose decentralization that exists today. Strengthening the headquarters organization by increasing the number and quality of staff is an essential first steps. It will lead to establishing an appropriate HQ structure to set policies and monitor field operations. The creation of a new regional office structure to replace the old provincial organization, with delegated powers from HQ combined with overall accountability, and the treatment of revenue at national level, while said to be politically difficult to achieve, is an important element of the reform program.

Clearly, the issue of Customs organization is key toward making further reform and completing modernization efforts across the Laos Customs Agency. The benefits and impact of these changes will be unknown until the defining decrees/regulations are issued.

- **Customs valuation.** The Laos Customs Agency faces many issues with Customs valuation which are common to developing countries. Many importers routinely undervalue their goods to lower their duty costs and Customs officers may allow lower values or underreporting of quantities in exchange for illegal payments.

Laos uses two systems of customs valuation: *Transaction value* is defined as the price actually paid or payable for the goods when sold for export to the country of importation.

Valuation in Laos is based on the transaction value of the imported item, which is usually found on the shipping invoice or valuation is based on the certificate of reputable organization such as the Chamber of Commerce of the country of origin that has expertise on price and fair market value. If the importers cannot provide any of these documents, customs valuation is based on a reference list, or upon domestic price FOB CIF (the so-called *general price*), plus 15 percent.

As a candidate for WTO Accession, Laos will need to conform to GATT Article VII, which offers model statutes (beginning with transaction value) for Customs valuation. The unofficial translation of the new Customs Law is unusual in that it provides for adherence to the GATT article but leaves the details to the decree process.

Trade Facilitation Legal Issues to Address.

- **Import Licensing.** GATT provides restrictions on countries employing import licensing systems and increases transparency and predictability. For example, the agreement requires parties to publish sufficient information for traders to know the basis on which licenses are granted. It also offers guidance on the diagnostic of applications. Additionally, countries are encouraged to eliminate licensing or to use automatic licensing.

Laos' Ministry of Commerce eliminated licensing of imported and exported goods in 1994. Nevertheless, companies are required to submit a periodic plan of imports which are approved and decremented on a shipment-by-shipment basis at the ports of entry/Customs warehouses. The decremented balances are kept on a spreadsheet and transmitted to the Ministry of Commerce. Members of the trade community report that these approvals are restricted and that companies often "buy space" on another company's plan for a premium of 2.5% of the value.

GATT defines import licensing as "administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member." Clearly, then, the required periodic plan constitutes an "import license" and is not in conformity with GATT.

An additional issue arises from the process followed by Commerce at the ports and warehouses. Required documentation and approval by the Ministry of Commerce duplicates the Customs process and adds steps, time and cost to an already complex import process.

- **Trade Statistics.** A modern economy needs accurate and timely trade statistics as part of a measure of the balance of trade for the health of the national economy, to formulate and measure the effects of trade negotiations with other countries, and as a source of data for export promotion. Since the Customs Agency is the source of these statistics, accurate data needs to be transmitted to the statistical unit which validates the data and issues and analyzes the trade data. Government officials, donors and trade representatives all reported estimates of up to a 40% error rate (undercount) in official statistics. This

undercount is due to a variety of factors, including smuggling, corruption, and errors due to inefficiencies of the Customs automated system, known as C-2000.

C. Implementing Institutions

The **Laos Customs Agency** is the lead border agency in Laos. The Agency employs 793 employees with 52 check points in all. Cargo can cross only at 16 international check points or at Laos' three international airports. Organizationally, 16 provincial management centers control the bulk of the employees and operations of the ports of entry. Customs is organized into six Divisions: Administration, Legislation, External Relations, Statistics, Post Clearance Audit and Enforcement.

The Customs Agency needs to reorganize in such a way that enables strong central control of revenues, employees and ports. Until centralization is realized, little more can be accomplished to enhance trade facilitation.

Implementing Institutions: Factors Supporting Trade Facilitation. Laos has shown considerable initiative in passing a new Customs Law which addresses the issue of Headquarters authority and control, as well as that of taking steps that will more closely align Laotian Customs practices with those of the WTO models. The ultimate success of the Customs Law depends upon the successful issuance of decrees that will implement the law's provisions, and the process of implementation itself. The centralization of authority issue is a particularly thorny problem since it involves provincial revenue generation, control of ports/facilities and staffing/personnel issues for Customs.

Additionally, the trade community gives Customs much credit in simplifying import and export procedures and lowering duty rates. Some progress has been made in simplification and facilitation by governmental authorities. Reduction from 18 to two signatures required for export of garments and elimination of the Economic Police's presence at the Customs inspection of exports are notable achievements. Recent discussions regarding a major Hydroelectric project between the government and the freight forwarders succeeded in lowering the number of signatures required for imports from 8 (which took 30 to 60 days to secure), to three. Much of this progress is the result of trade pressure and dialog. In addition, procedures to expedite release without declaration filing are in place. Cash or a bank draft in the amount of 120% of the duty liability can be posted with Customs. In Vientiane provincial Customs, however, the importer must secure permission to use this procedure with each individual shipment (one-half day). In other provinces, permission is given directly at the inspection site.

Implementing Institutions: Issues to Address.

Customs Procedures. Lao Custom import procedures are complex, have many steps, and are not viewed in their entirety as a business process. The current state of affairs causes confusion, unpredictable outcomes, and inefficient and impractical port processes. Additionally, the port procedures of the Customs Agency on the one hand, and the Ministry of Commerce on the other, are duplicative and redundant. The lack of harmonization of data and forms necessary for completing Customs and the other border agencies' formalities require the trade community to

complete multiple forms with essentially the same information. Importers and other trade community members complain about these costly, time-consuming, and unpredictable procedures.

Import/export authority can take months to secure. Factors that slow down the process include the requirement that all cross-border shipments secure an official confirmation from the provincial government that the commodity is not restricted; filing of yearly estimates of volume of anticipated trade against which every shipment must be approved (referred as a plan *not* a license, as detailed above); and limitations the Customs declaration to no more than five “HS” numbers, which requires multiple declarations for shipments of assorted merchandise. If advance preparation has been completed, import and export formalities can be reduced to about 10 to 15 days preparation. In the context of international standards, this process is too long and it inhibits the trader from meeting the consignee’s demands for speed to market required in the very trendy fashion market and just-in-time inventory patterns of today.

Export procedures have been streamlined for garment and textile exports to a great degree but not for the other sectors. The trade community reports that the Customs procedure is relatively complicated and that the entire process is non-facilitative, takes many days to complete, and requires many multiple and consecutive visits by various authorities. This convoluted process raises the costs of goods while providing little benefit. Most countries want their export process to be uninhibited, uncomplicated and as facilitative as possible consistent with national interests. Also, a Single Window concept where all government agencies provide an expeditious and unified face to the trade community has not been implemented at Thanaleng warehouse.

Cross-border procedures continue to be unpredictable, time-consuming, redundant and tedious for the trade community, adding time and cost to each transaction. Often the simplification of the Customs business process is not followed up by actual improvements on the ground. Average documents required within the region for an export transaction is 7.1, while Laos requires 12. The same disparity exists in import documentation, with a regional average of 10 while 16 are required in Laos. Signatures required are almost triple regional averages. Examination of every import and export shipment results in cursory inspections which add nothing of value to the process while compounding fees, licit and illicit, paid by the exporter. A lack of transparency is evident: many traders are unaware of the current laws, fees and requirements regulating their industry due to lack of publication, training and input into the implementing regulations. This includes the Customs law passed last year. Laws published in the newspaper are not followed by implementing decrees/regulations. Following rules in an unpredictable regulatory framework is an impediment for the trade.

The government in Laos recognizes need for exports as key to growth of economy and has simplified some procedures, particularly for the garment industry. Nevertheless, the current environment is neither facilitative nor conducive to trade. Lao traders enjoy some of the lowest duty rates in the region; however, importers and exporters face too many **non-tariff barriers**. These are due not only to arduous Customs processes but also to attempts by the government to control imports and exports. These constraints result in a trade environment which is the most restrictive in the region.

Automation. The Customs Information Technology system is known as C-2000. Although it represents an improvement over the previous system, C-2000 is problematic because it has limited functionality and flaws. Declarations are late or not submitted by the ports that use modems and floppy discs to convey their data to spreadsheets maintained by Customs Headquarters. Also, the system does not identify “lookouts” or black list suspects, for the basis to collection or ACH, perform risk management or selectivity functions, or edit or reject erroneous data.

The single-stop inspection. As a member of GMS (Greater Mekong Sub-region) Cross Border Transport Agreement, Laos is piloting a major border facilitation project called the “single stop inspection” at the border with Vietnam. Lack of harmonization of the Customs laws within the region is creating difficulty. Under this concept, shipments from Thailand, Laos or Vietnam will proceed across the border without any inspections or border formalities by the exiting authorities. These will be performed by the receiving country. Expansion of the pilot is planned at the Thai border in early 2007 upon completion of new bridge at Savannakhet. This project directly furthers the Vientiane Action Plan’s objective of removal of barriers to the flow of within the region and creation of a single trading area. The Customs Agency reports that enforcement of Laotian law for penalties and other sanctions on foreign soil has been a large impediment.

Corruption. Many sources report that corruption among the public agencies, *especially* Customs, is pervasive, although at relatively low levels—large sums are usually not involved. “Tips” are routinely requested and given during the course of the business day to speed shipments or to avoid major delays. In fact, unofficial fees double the official fee amount on each transaction. The latter are paid to public *and* to private entities, such as the warehouse operators. Although these payments tend not to be high per shipment, about \$30 in total, because of their compound effect, such positions as Customs officers are generally not selected based on qualifications but rather bought based on patronage and cronyism. The results are a staff less interested in the administration of uniform, transparent procedures than in the collection of “tips.” Unofficial fees at some of the heavier volume commercial inspection posts can amount to \$10,000 per year. Many importers said that payment schedules are not posted, making it difficult to differentiate between legitimate fees and unlawful bribes. Posting of fees at all border locations, which might reduce this practice, was agreed upon in 2004 with Thai authorities, but has not been implemented. These unofficial fees and charges must be reduced to increase competitiveness and upgrade the professionalism of the public officials. This will be difficult to accomplish until government salaries are substantially raised to a living wage.

Moreover, those shipments that are delayed to the end of a day and would normally be held for processing until the next day are subject to an unofficial “overtime” schedule of informal payments. Further, government officials and the trade community both suggested that Customs officers at the crossings and border stations allow fraudulent declarations of value or quantity in exchange for illegal payments. This illegal activity distorts trade statistics and inhibits revenue collections.

Training. All training for Customs employees is informal, on-the-job training. Opportunities are lost, therefore, to enhance professionalism and correct individual bad practices, weed out

incompetent trainees, and provide standardized curriculums in Customs law, procedures and ethics.

Intellectual Property Rights. Intellectual property rights are seldom enforced at the border. Small shops selling non-conforming goods are common in Vientiane. Customs officials stated that training in identifying counterfeit goods does not exist and officials are unfamiliar with procedures to be followed if counterfeit goods are encountered.

Professionalism. The Laotian Customs Service has adopted new uniforms that are professional in appearance and worn with pride by their uniformed officers. All officers interviewed were very professional in demeanor and knew the subject matter of international Customs procedures.

Risk Management. All goods are inspected and are subject to delays regardless of the risk they pose to Laos' national welfare or revenue. Additionally, the Customs post-clearance audit function is limited in scope. Auditors review completed declarations and do not conduct verification of values and other items using the importer's records. The reviews that are completed reflect arithmetic and document checks.

Public-Private dialogue. No systemic pattern of dialog exists between the implementing public agencies and the trade sector. "Once in a blue moon" was one answer from a trade community member in answer to a question of how often Customs meets with the trade to discuss issues or conduct training. Lack of a true partnership results in requirements which are neither facilitative to the trade, nor easy to implement. It also creates a general distrust in public institutions.

D. Supporting Institutions

Although the Customs Agency is the main implementing institution for the movement of goods, an efficient trading system relies on an interdependent process that includes other trade-related public sector institutions, trade service providers *and* the traders themselves – importers and exporters. Their capacities and performance can result in significant costs (or savings) within the trading system, and optimized trade facilitation depends on their active involvement. Like the Customs Agency, the trade-related public agencies also need sound management, well-trained staff, modern equipment, modern facilitative procedures and active dialog with the trade to respond timely and predictably to issues while guarding the public safety and security of the country. Additionally, the private sector trade community adds its expertise and familiarity with expert legal and logistical knowledge to the import/export process and as such is crucial to the efficiency and overall compliance of international trade movements.

The trade community in Laos is generally not well served by either the public or private supporting institutions in Laos. Many of the problems arise because of lack of capacity of personnel in sectors, complicated and burdensome procedures and the unavailability of quality transport and Customs clearance professionals. The government has taken steps in recent years to address these issues and simplify procedures with some success. Strategic plans have been developed to strengthen the transport industry and regulate the Customs brokers but these often lack proper implementation at the provincial level where regulatory power is entrenched. However, the trade community is slowly gaining some collective power to influence change in

the service institutions. Transport costs have been reduced but still exceed those of neighboring countries. Mandatory use of privately operated warehouses for Customs clearance is a fairly efficient process except for the limited hours of operation and additional layer it presents for solicitation of “tips.”

Supporting Institutions: Factors Supporting Trade Facilitation and Issues to Address.

Public Institutions. The traditional border agencies are present at the border checkpoints in Laos are the following:

- Ministry of Justice—Immigration police functions
- Ministry of Health—Food and drug purity
- Ministry of Agriculture—Animal and plant diseases and pests
- Ministry of Commerce—Licensing and verification of imports

The Immigration Police, Health Inspectors and the Agriculture inspection service perform useful and valuable functions for Laos. Health and Agriculture inspections documentation are reviewed consecutively and cause delays because the single window concept has not been fully implemented.

The border agencies’ commercial processes are not integrated and certainly add to the congestion and time for Customs and other border control formalities to be completed. As detailed above, most problematic are the Ministry of Commerce procedures, which essentially duplicate the Customs processes and add an extra and unnecessary step to the border process.

Importers/Exporters. The Lao National Chamber of Commerce and Industry (LNCCI) estimates there are about 10,000 business enterprises in Laos, most of which are unregulated. Most businesses, due to the limited national market, must build their strategy around export markets and rely on imported products. As an example, of the 800 current members of the LNCCI, about 50% engage in international trade.

The largest business sector doing international trade currently is the **garment manufacturers**, representing the greatest earners of hard currency for the Laotian economy. These operators export their production and import 95% to 99% of their raw materials. These materials enter free of duty without a cumbersome temporary admission procedure. The only requirement is that the finished product be exported within 120 days under a simplified export process. In fact, Laos has a more facilitative approach than Thailand, where control of raw materials is reportedly much more onerous. Unfortunately, full economic benefit is not realized because efforts to create local producers of such items as buttons and thread have not produced viable Lao suppliers due to lack of access to credit and the general difficulty in starting a business. In contrast, Vietnam produces much of the raw materials for its export garment industry.

Transport sector. Two-thirds of all international traffic travels overland by road. Accordingly, the trucking industry is a critical component in the trade service sector. The transport industry must be in a position to reap the potential benefits that will result from completion of current infrastructure projects to upgrade major transit corridors and implementation of the ASEAN free

trade area. The principal trade route for access to the sea is through Thailand to ports in the Bangkok area. The roads on this link are more extensive and well maintained and port operations more efficient and cost effective than the routes to and through Vietnam.

ASEAN stipulates the free flow of transport vehicles within the region. Though the Vietnam port of Voong Aung was developed to attract trade from Laos, because it has only three charter vessels calling per week and is not efficiently run, little use is made of this facility. The Lao government has shown little interest in accepting the offer of the Vietnamese to take over this port.

In addition, an in-transit agreement with Thailand implemented in 2004 allows trucks from both countries to carry international goods into each other's territory, as long as the trucks conform to national transport regulations. In practice, this agreement has worked mostly to the advantage of Thai transporters. Currently, Thai trucks haul cargo directly from Bangkok to the Customs inspection site in Laos with approval of the provincial transport authority—an authorization easy to acquire with payment of appropriate fees. Lao truckers must also secure a similar transit license from the Thai government to enter, transport within their territory. Lao trucks have not, however, secured this in any numbers. Of the approximately 100 commercial trucks available for international transport in Vientiane province, only 20 are certified as meeting the safety and emissions standards of the neighboring countries and thereby permitted to conduct cross border trade. The predominate procedure is for the Lao trucker to make only the domestic leg of an import or export movement, if it is involved at all in the transport of cross-border shipments. Trucks will offload export cargo into Thai trucks at the border or pick up imported cargo after delivery at the Customs inland warehouse. It should be noted that transit times to and from Thailand are predictable and reasonable - 1 ½ days for transit and from 1 to 4 days in port. The higher number is attributable to the more extensive inbound clearance procedures of the Thai authorities.

The **trucking sector** consists principally of small operators, usually one driver with one truck, with old 10-wheel trucks, that are loosely organized into groups to attempt to meet trader requirements and bid on projects beyond the capability of a single carrier to handle. There are few medium and no large trucking companies firms in Laos. Little or no capacity exists for handling containerized transport. Also, 20-30 Lao freight forwarding companies operate under regulations of the Department of Transport, under the Ministry of Communication, Transport, Post and Construction. Licenses are renewed yearly. Agent charges, including clearance charges, transportation arrangements, fees at warehouse, port etc. are about \$300 to \$350 per load, which are reasonable and considered good service for cost by the trade.

In 1997, the **Lao International Freight Forwarder Association (LIFFA)** was established to upgrade the professionalism in the freight forwarding and transport business and to promote investment in the sector. It is currently not a member of FIATA, the International Federation of Freight Forwarders Associations, nor is it a strong, proactive association.

Another principal vehicle for public-private dialog with the transport sector is the **National Transport Facilitation Committee (NTFC)**, established under the Department of Transport. This group was created as a result of the initial agreement between Thailand and Vietnam on

Cross Border Trade in 1999. Appropriate representatives of both public agencies and the trade are members. The objective is to facilitate transport by streamlining procedures and to promote investment in the sector.

Five **express carriers** currently operate in Laos. Although volumes are small, with the largest handling about 40 to 50 packages per day, they continue to grow as international investment and trade expands. FEDEX, the largest and oldest carrier, has a unique arrangement with the Lao Postal department whereby its employees handle receipt and dispatch of packages on a reimbursable basis. Other couriers have their own employees performing these same services. Express packages are brought from the airport to the central post office for processing and clearance. The consignee or his representative, not the carrier, clears the goods through Customs using the same procedures applicable to any commercial transaction. Clearance time averages 1 to 2 days, about half the time for regular air cargo.

Many organizations are working to simplify and harmonize legislation, regulations and procedures for cross border transport in the region with slow but steady progress. The influence of these organizations and the requirements they have imposed will continue to drive change and accelerate its pace. Some of the most prominent are **ESCAP (UN Economic and Social Commission for Asia and Pacific), the GMS, and ASEAN.**

In addition, transport procedures have been significantly streamlined and continue to improve. In 2003, a yearly International Transport Permit eliminated the requirement for provincial approval of each transport. In 2006, authority to verify and authorize movement of vehicles will be transferred to Customs, eliminating the need for an on-site transport official at the border. This will be done after pilots at both the Lao Bao border checkpoint with Vietnam and the Friendship Bridge with Thailand.

Transport costs have declined with Lao-Thailand Transit agreement in 2004. The monopoly previously enjoyed by handful of Thai trucking companies was eliminated and the new competitive environment had reduced freight rates from \$1200 to about \$850 to \$900 per load. Fortunately, the Department of Transport is an active force in promoting trade facilitation and strengthening the Lao transport sector. The department's strategic plan addresses the core problem areas and incorporates a true action plan geared toward solutions. Implementing steps are on-going. NTFC (mentioned above), is under the leadership and secretariat of this department. It has been a much more effective forum for problem resolution through dialog with the trade community than most such efforts. A tentative agreement had been made with the Ministry of Commerce to expand the role of the NTFC to include trade as well as transport facilitation in recognition of the interdependency between the two. This agreement is expected to be in place in 2006.

Agreements with **regional partners**, including bilateral agreements with Vietnam and Thailand and 20 annexes and protocols on cross-border trade under the Greater Mekong Sub-region infrastructure to facilitate cross-border trade and to improve the competitive position of Lao transport industry, have been signed and are in various stages of implementation. When these are finalized, they should greatly reduce the time it takes to move a shipment across regional borders.

The Lao transport sector, in particular the overland trucking sector, is not competitive within the region. Thai transport companies, the most organized in the region, dominate the market. This diminishes competition, raises costs and results in fees over which the private or public sector in Laos has little influence. Currently, there are insufficient Lao companies with the capacity to transport cargo of any volume or rapidity, including the cargo of garment producers which should be containerized to protect it from the elements. Unless investment and training is undertaken, the industry will be shut out of the expanding cross border transport opportunities created by improved infrastructure and regional integration efforts such as AFTA. Also, change is difficult to implement within this sector. There is a general hesitancy to embrace a different way of doing business and the trade's limited knowledge of international transaction requirements, road safety and port procedures, and transit regulations. Details as to the impact of change, supported by facts and figures, reviewed multiple times, are needed to get acceptance which slows the progress of reform. Further, infrastructure project studies and their execution do not include facilities on these corridors which can be developed to benefit the national economy. These would include consolidation and distribution facilities and such indirect opportunities as truck parking and support services for the transporter. This results in Laos gaining little or no value from the transit cargo passing through its borders.

Costs of transport are 14% higher in Laos than in neighboring countries because:

- Small traffic volume and the disparity between imports and exports produce many empty moves and less than full load movements.
- Additional fees are incurred as the result of having to use the port facilities of other countries.
- Unsuitable condition of roads, bridges and poor quality of fleet add to transit time and fuel and maintenance costs.
- Dual handling of cargo by both Lao and Thai trucks increases costs

If Lao transport companies could be upgraded and their capacity strengthened to compete successfully in the region, shipment costs could be lowered from the current \$850 to \$900 range to \$600 to \$650 per load. Hindrances include no consolidation, distribution services operate within Laos where the small exporter can send goods to be consolidated with other partial shipments to significantly reduce transport costs. Partial loads must pay full load prices. Furthermore, the NCTF (National Committee on Transport Facilitation) is under-staffed and under-funded, which limits its effectiveness and accomplishments. Moreover, despite national freight forwarding firms that are professional and currently enjoy a large percentage of the market, limited agency representation at foreign ports where goods arrive and depart will hurt Laotian business interests. Foreign companies within this sector will eventually dominate the market to the detriment of Laos.

Little accommodation is made in Laos to expedite shipments handled by the courier sector, an industry which survives on speed of delivery. Packages are not cleared at point of arrival, no special regulations are in place to expedite clearances and releases that should occur in hours take days. The volume of such consignments which include priority business documents and

critical spare parts will continue to grow as trade expands. If processing changes are not made, production schedules and delays in the conduct of essential business services could result.

Customs brokers. In the past, only one company was approved by the government to conduct Customs clearance. When that company closed in 1997, the sector was opened to competition. It currently operates without any oversight or regulation by Customs or other public agency. About 200 companies registered to perform this service, but only about half of these are active. Estimates are that only 20% to 30% perform proficient and professional service. These are the better established companies rather than individuals. In the opinion of the trade costs are reasonable for the service provided. The sector is not represented by an association or collective body, even within the LNCCI.

Steps to initiate some basic control over this group through the issuance of ID cards to gain entrance into Customs areas have been taken by Customs in Vientiane province. The effectiveness of this procedure is subject to some doubt. Some firms or individuals are required to submit only evidence of having a business and tax license while others must demonstrate the qualifications of its personnel in Customs procedures. Under this program, more than 100 yearly badges have been issued.

The new 2005 Customs Law provides a framework for oversight and regulation of this industry by Customs. The intent is to require experience and competency, determined by a test administered by Customs before the Commerce and Tax offices will issue licenses to operate in this field. The current plan is to have these implementing regulations signed by the Prime Minister by April, 2006. Customs does some limited training for this sector when major changes occur. It plans to provide training on the new law once the implementing regulations are in place.

Currently the vast majorities of people performing this service are not knowledgeable of Customs requirements and can offer on the small importer/exporter only the use of their personal connections to the local Customs officers. Omissions or false/misleading statements on the documents due to this incompetence result in the trader being subjected to penalties or seizure or the payment of higher unofficial fees to secure clearance.

The new Customs Law is not a guarantee of instituting quality standards for this sector. As in other areas of interest, decrees defining and giving procedural guidance to this vital sector are controversial and are not finalized. It is possible that the final result will not provide for a strong enough regulatory regime to cull out the unqualified players and promote a strong professional cadre of Customs clearance agents, a service vital to the trader.

Another issue to be decided is if current agents will be grandfathered in or whether they have to meet the new requirements. Success in professionalizing the brokers will also depend on whether this regulatory control resides at the national or provincial level of Customs. Provincial control would both complicate the qualifying process for companies doing business in multiple locations and inject political influence into the process.

Implementation of the new regulatory requirements for this industry will be difficult because of the lack of knowledge and input into the Custom Law and its implementing regulations by the

private sector. Customs brokers or agents, even the largest and more professional, are unaware of the potential changes and are making no preparations to ready themselves the meeting the higher standards.

The lack of an association representing the customs brokers impedes the sector's influence on Customs practices, provides no vehicle for Customs to use for effective and timely communication, and eliminates the use of self-policing and training to upgrade professionalism from within. The sector is unable to seek counsel, training materials, and support for upgrading the capacity of its employees, the primary benefits of being a member of a regional or international organization.

Warehouse facilities. Laos has no provision for Customs-bonded warehouses, which provide for the long-term storage of imports without duty payments. The current law gives importers two weeks to clear goods and to pay the duty required. This period can be extended for up to four months but such cargo incurs a Customs penalty of \$150 per vehicle or truckload. Four warehouse terminals operate as part of the 13 official inspection sites for commercial cargo clearance. The largest is the Thanaleng Warehouse in Vientiane municipality. The others are at the Chinese border, Wattay airport, and Pakse near the Thai border. Their hours of operation coincide with Customs, from Monday to Friday, 8 to 12 and 1 to 4:30. Forty percent of all Customs import clearances are conducted at these sites with the remainder completed at the border crossing point or importer's premises. Exports do not enter these facilities.

The Thanaleng facility is privately operated under a 1993 license from the Ministry of Commerce. The operator has a 15-year lease with government for use of the land and its facilities. The tariff as well rate increases must be approved by this ministry as well. Annual fees of about \$230,000 are paid to the government by the Thanaleng operator. Volume is 80 to 200 trucks per day, all entering from the Friendship Bridge with Thailand. This represents about 150 to 200 tons per month or 60% of all cargo imported in the Vientiane area. The services provided by the operator include weighing, labor and equipment for offloading and reloading all cargo, and quantity verifications. Official fees to use this facility are \$50 to \$60 per truck with an average turnaround of one to two days. Charges include \$10 for weighing, \$5 for general usage, \$1.50 per ton for labor to load and unload, and 170 to 200 Kip per ton for each day the cargo remains in the warehouse. Free office space and equipment is provided for the provincial public agency personnel required for release, including Customs, Veterinarian Service, Transport, and Health under the single window concept.

Clearance of imported goods using these facilities is fairly expeditious and provides the public agencies the space, equipment and labor to conduct more thorough examinations than at the border. Also, all public agency personnel required to authorize release are located at these facilities to expedite the process. All cargo, however, whether high risk or not, is directed to these facilities. Many countries release much of their cargo at the first point of entry and send only high risk cargo to a clearance warehouse.

Good working relationships exist between the operators and the government agencies housed within these facilities. Regular meetings are scheduled and are effective in resolving issues. Also,

the Wattay Airport warehouse, run by the government entity Lao Aviation, is viewed by the trade as an operation that provides a good level of service at a reasonable cost.

The Thanaleng warehouse operation is costly. Final fees paid are generally double the official ones, since many of the warehouse employees must be tipped to do their jobs. It is reported that the gate guard alone gets \$2.00 to \$3.00 per truck to allow entry into the facility. The operator openly announced its ethics code -- soliciting of tips is prohibited, but if tips are “voluntarily” offered, they may be accepted. The relationship between the Thanaleng proprietor and the private sector users is contentious with the operator viewed as generally unresponsive and to the trade’s concerns. Even if permission to clear goods on a weekend is secured from Customs, the operator will not open the facility. The trade to date has been unable to resolve their issues through either direct discussions with the operator or with the government agency that regulates this sector.

The public sector’s regulatory role appears limited to issuance of the lease and insuring its quarterly payments are received. Establishment of standards of service and enforcement of them through effective oversight are not being performed. Security at these facilities is inadequate. There are no cameras and background checks, if done, consist of a letter of recommendation from the village leader. Theft and pilferage are reoccurring problems and add to the trader’s cost of doing business. Additionally, regular hours of service need to be expanded at the major facilities to include later daily hours and some limited service on the weekends. Generally trucking rates account for a three-day transit time from Thai ports to delivery in Laos. A driver is paid \$100 for any additional days. An arrival on Friday afternoon that must be held over the weekend adds \$200 to the transport cost.

The lease selection process for the operator lacks transparency and is not competitive. No instructions on operator responsibilities or the means of submitting a bid are currently published, even though the 15-year lease for Thanaleng expires this year. The bidding process and its requirements must be published and include measurable service standards and a process for resolving trade issues, which are developed with trade input. Such a competitive and transparent process would provide the government and the trade benefits, the first by receiving the maximum remuneration for the lease and the latter from an upgrade in the responsiveness of the operator to its issues and lower costs of using this required service.

Trade associations. The most visible association serving the private sector is the **Lao National Chamber of Commerce and Industry (LNCCI)**. Previously part of the Ministry of Commerce, in 2000 it was established as an independent body. Although still loosely supervised by the Ministry, it is financially independent, supported by membership fees of \$20 per year and by fees associated with issuance of Certificates of Origin for Lao export goods. About 100 of the latter are issued per month, at a fee of about \$1 each. Currently LNCCI has about 800 members, comprised of mostly firms with direct foreign investment in the country. As a result, about 50% of its members are involved in international trade. Membership represents no more than 10% of current private enterprises. The institutional framework for the organization is broken down into between 15 and 20 business groupings such as handicrafts, textile and garment producers, food stuff and consumer goods to promote dialog within the sector to identify common issues. The garment producers are heavily represented.

LNCCI's principal role is one of advocacy for the private sector, serving as the link between business and the various governmental institutions regulating commerce to expand business opportunities, and increase the member's competitive position in the regional and global marketplace. The organization reviews drafts of all commercial related laws and regulations, conducts direct dialog with ministries through its industrial sectors, and sits as charter members on governmental committees formed with trade representation.

LNCCI has had some limited successes in addressing the issues of its membership, although dialog between it and the public institutions is in its infancy and has no formal structure. Instance of this include the reduction of signatures required on export documents of garments and its impact on draft legislation related to taxes on hotel operators. Although the original draft proposed a 5% levy, the organization was able to get it reduced to 1%. The implementation of the WB Business Forum project, which has enjoyed success in both Cambodia and Vietnam, is now underway, under the auspices of the LNCCI. Although it is just in its initial phases, the trade and LNCCI are optimistic about its potential to improve partnership efforts that will expedite implementation of trade facilitation.

The LNCCI lacks both the financial resources and institutional capacity to adequately service the needs of the private business sector and upgrade its competitive position. Substantial increased membership is difficult to achieve since the vast majority of the estimated 10,000 businesses currently operate informally. Upgrading the capacity of its current staff in such areas as export promotion, market research, management and quality control programs and general human resource issues is needed to increase its effectiveness. The results of dialog through the NLCCI and government in problem resolution are limited, slow in implantation and undocumented. The institution has no way to track its activities or results. Such a system is critical in measuring success, providing follow up on pending issues and demonstrating to prospective and current members the value of the organization.

LIFFA, the association for the freight forwarders and transport sector under the NLCCI, is not a strong proactive association that undertakes viable efforts to upgrade the capacity of its membership. Lessons could be learned from the Thai freight forwarding association which offers training courses and a full range of services.

E. Social Dynamics

The government clearly recognizes that a key ingredient to the expansion of economy is the growth of international trade. It has opened its doors to foreign investment, concluded multiple regional and international agreements to reduce tariffs and restrictions, is a member of ASEAN, and is seeking membership in the WTO to promote its competitiveness in the international marketplace. Although trade facilitation efforts are fundamental to achieving these goals, Laos still has one of the most restrictive trade environments in the region. National policy and laws requiring streamlining of the process of cross border trade are not effectively implemented by the implementing and supporting institutions. As a result, trust in the public institutions is low among the private sector.

In general, these poor results are not due to a lack of will or a purposeful resistance to improving trade facilitation. They stem rather from the lack of capacity of government officials to understand how to achieve this goal and an unawareness of the detrimental impact their efforts to continue to control all aspects of the import/export process have on economic growth. These officials have not established the link between heavy regulatory requirements and slower trade expansion, even though garment manufacturers are now settling up new facilities in Vietnam rather than Laos because of these policies.

When progress does occur, it comes slowly for fear of losing control of the process and is generally the result of demands by the foreign investor or from donor or/ regional institutions. Another factor that impedes trade facilitation progress is the lack of capacity within the private sector supporting institutions to adapt to change and modernize its operations to compete effectively even within the region.

Laos has made tremendous improvement in the past few years and has the desire to continue this modernization trend. The will to remedy some of the issues that cause inefficiencies is strongly reflected in the new Customs law that has been passed by the Laotian legislature and by Laos' desire to conform to the WTO principles and model statutes. The future success of the Laotian Customs modernization effort will depend about the outcome of the current negotiations with the provinces in writing the decrees to implement the new law: if Customs Headquarters is not strengthened, then further reform will be extremely difficult.

Complicating steps to achieving progress in trade facilitation, currently there is little real effort to open dialog between the public and private sector to resolve these issues, although there are a few leaders within government who are driving changes in their respective areas in partnership with the trade. The benefits of trade input into development and implementation of regulatory improvements is not yet recognized as a guiding principle. In addition, the trade is not well organized to promote this access and to provide an effective conduit for this to happen.

The cultural practice of accepting unofficial tips for service, while not as extensive as that of its neighbors, is pervasive and this, plus political connections, influence the level of service provided. Presently, no request for such an offering is required; the drawer in the desk is just left open. The trade knows what is expected if cargo is to move without other than normal delays. Such "fees" will continue to increase if the practice is unchecked. In many instances they already exceed the official collections. The fact that neither official fees nor procedures are published and posted at the inspection sites encourages this practice and indicates the government's lack of resolve in addressing the issue. Such practices provide a high degree of uncertainty to the trader regarding shipping costs and delays.

The Government maintains control over the media, even to the point where newspapers workers are government employees. Therefore, this sector, which can be an effective watchdog of public and private behavior in most societies, is eliminated as an agent of change in Laos.

F. Recommendations

- Strengthen and centralize the Laotian Customs Agency by promulgating strong decrees based upon the new Customs law.
- Automation initiatives should be continued and an IT strategy defined.
- Manual processes and data requirements should be streamlined and harmonized for both the import and export process.
- Customs should perform essential Commerce functions and “licensing” should be eliminated.
- Trade Statistics processes and validations should be analyzed and improvements made to the entire process.
- The new Customs law and resulting decrees should be analyzed to ensure conformity with the WTO to speed accession.
- IPR training including the legal basis for enforcement should be conducted for Customs Officers.
- A Code of Conduct and Table of Discipline needs to be established, promulgated and enforced.
- Internal controls, spot checks and internal integrity investigative capability should be established in Customs Headquarters.
- A complete list of fees and charges should be posted and available at Diagnostic and collection locations.
- Strengthen dialog between the public and private sector through the following actions:
 - Support the start-up and continuation of the Lao Business Forum, a World Bank initiative, whose fundamental purpose is to upgrade the business climate through dialog between the public and private sector. This is under the local leadership of the NLCCI and the CPI (Committee on Planning and Investment) and has proven successful in both Vietnam and Cambodia.
 - Assist the NLCCI in growing into an organization which can offer a full range of quality services to its membership and influence public policy through the following actions:
 - Upgrade capacity of current staff in such areas as export promotion, market research, management and quality control and general human resource issues. This could be accomplished through visits to neighboring Chambers such as that of Vietnam to learn the basics of what and how a chamber should operate and then progress to more modern chambers in the region such as Thailand
 - Develop system within chamber to track activities and results. This is critical in measuring success, providing follow up on pending issues and demonstrating to prospective and current members the value of the organization.
 - Support National Transport Facilitation Committee within Ministry of Transport which will soon be expanded and renamed the National Trade Facilitation

- Committee. Its program is ambitious but has produced results in facilitating cross border trade within the transport industry. However, it needs additional staff and an upgrade of equipment to expedite implementation of the recommendations.
- Establish a standing committee of Custom, both national and provincial and the trade community that meets regularly to discuss and resolve problems. This could serve as the conduit for the flow of information between the two. A subgroup of this would be a working group tasked with documenting, then streamlining current import/export documentation.
 - Strengthen the Lao transport sector through the following actions:
 - Support implementation of the action plan of Department of Transport which addresses the major issues that confront the transport industry. The plan includes a donor study of how to upgrade Lao trucking companies. This has been completed and preliminary findings reported. Primary goals of the transport strategy include seeking outside investment for upgrading the fleet and reorganizing its resources and a general upgrading of the capacity of its players in modern inter-modal trade.
 - Conduct training within the private transport industry, both the trucking sector and freight forwarders, in the concepts and complexities of modern, logistical services and supply chain management. Providers of such training material include FIATA, (International Federations of Freight Forwarders), TIFFA (Thai International Freight Forwarders Association) and SLA Singapore Logistics Association. The latter is held in high regard not only regionally but internationally and has offered to have its training materials used as the basis of a common training program for the region through the ASEAN Federation of Freight Forwarders Associations (AFFA). This can be accomplished through on site training courses, utilization of train the trainer concept, or tours of Lao freight forwarders and transport companies to their neighboring counterparts.
 - Establish a program for licensing and oversight of Customs clearance agents and establish an association to represent their interests. The program must be effective in eliminating the incompetent players and the association must be proactive in updating its memberships as new procedures occur. It would also serve as the conduit for dialog on industry matters with Customs and viewed as a partner by Customs in the facilitation and control of trade.
 - Conduct a feasibility study on the establishment of a cargo consolidation facility. Such a consolidation service would achieve economies of scale not now available to many exporters since most are small operations. Estimates are that such a project could lower transport costs from \$850 to \$900 per load (one way) to \$600 to \$650 by providing for a round trip haul.
 - Simplify export procedures through adoption of pro-export policy and system of Vietnam. Vietnam had diminished its intervention in exports and facilitated the process through use of an automated system linked with the trade. The exporter enters his to the export declaration into the system and electronically transmits it to Customs and the other pertinent agencies. If no indication of the need to examine is received within 24 hours, the shipment can be loaded for export. The concept is based on the principle that export

discrepancies have little impact on the exporting country and should be discovered and resolved by the authorities in the country of import.

- Implement the GMS (Greater Mekong Sub-region) Cross Border Transport Agreement's "single stop inspection" pilot beyond the Lao Bao border post with Vietnam as soon as possible and expand the project to include simplification and harmonization of export documentation. This must be done with input from the private sector. This one action would dramatically reduce time and costs to the exporter by eliminating almost all national interventions, reducing the documentation requirement and recognizing Customs as the agent for all border agencies.
- Design national trade related services to benefit from increased transit traffic resulting from completion of such major infrastructure project as the East-West corridor linking Thailand with Vietnam and the Northern economic corridor connecting China with Thailand. Estimates are that the latter will eventually extend from Beijing to the tip of Malay Peninsula. Increased trade volume and type of traffic flow should be studied to determine what opportunities this increased traffic presents to the trade service industry such as in consolidation services or logistical support.
- Improve transparency and competition in the selection and operation of warehouses that serve as Customs clearance sites. The bidding process including requirements of the operator and measurable performance standards should be developed with trade dialog and made public. Such steps would provide the government the maximum remuneration for the lease and the trade with a service more responsive to its need at a lower cost.

XIII. Flow of Money

A. Introduction

In a modern economy, trade-related financial flows are essential to competitiveness. These flows are facilitated by strong banking sectors and flexible where there is adequate access to credit and foreign exchange. Poor access to credit for domestic-owned traders impedes start-ups and stifles expansion by the countries producers. Burdensome foreign exchange requirements drive up the costs of doing business and ward off foreign investors.

In Laos, cross-border transactions reflect a low amount of monetary exchange, especially compared to neighboring countries. Under \$2 billion in goods and services were traded in 2005 – exports \$659 million and imports at \$1.1 billion.⁵⁵ Net FDI inflows amounted to \$265 million in 2005, which was up slightly from \$256 million in 2004. The banking system is small with domestic and foreign banks present, including three state commercial banks, ten private banks (seven foreign and three domestic), one representative office of a foreign bank and one agriculture promotion bank.

Overall, Lao laws, public and private institutions do not support these trade-related money flows. Basic trade finance products are not available widely to traders, even though some banks technically provide a full range of international banking services, including import and export letters of credits, import and export collections, bond and guarantees, inward and outward transfers and payments. Foreign currency exchange, while available, is not easily exchanged for all traders. And although, Laos has made progress in trade-related finance over the past decade, the country needs to do much more if it is to grow and compete.

In this chapter, we analyze legal, institutional and operational issues regarding trade-related finance and recommend ways to minimize those constraints. First, our analysis focuses on legal framework for the trade-related institutions, the banks, currency exchange providers and central bank. Second, we consider the operational and institutional issues regarding trade-finance management and operations. Third, we review other institutions involved in trade-finance facilitation and their role in trade facilitation. Lastly, we identify major recommendations to improve facilitation of trade-related money flows.

B. Legal Framework

The basic legal framework regarding the efficiency and security of the most basic trade-related financial flows (i.e., letters of credit, currency exchange) is present and generally sufficient. However, further developments in the legal framework are necessary to develop a robust domestic market with better access to international trade.

Legal Issues that Support Trade Facilitation. Since becoming more open economically in the late 1980s, the legal framework has undertaken many necessary reforms. For example, Lao

⁵⁵ World Bank, “East Asia Update 2006.”

residents and foreigners can hold foreign exchange accounts. Also, commercial banks may set their own savings rates above the government set minimum rate. Additionally, the legal structure allows for trade-related finance through wire transfers, foreign checks, commercial letters of credit, standby letters of credit, documentary collections and open accounts. Other changes allow foreign investors to transfer profits and other legal income abroad through authorized banks. As a result of the legal changes, in part, the “Kip,” once highly controlled and distorted by black market rates, is exchangeable at roughly market rates, and laws addressing illegitimate financial flows are in place.

Trade Facilitation Legal Issues to Address. Yet, to continue economic development, trade-related money flows need to be facilitated through stronger financial institutions and greater currency flexibility for traders. These improvements will make Laos a more attractive place for foreign investment and trade. Most importantly, it will greatly benefit Laotian producers, who are now greatly hampered by legal and operational restraints regarding trade finance. For example, Lao PDR should consider revising the law making the use of foreign currency for domestic transactions an offense. Laws that provide more sophisticated financial tools, such as currency options and swaps, also should be adopted. As with many Lao institutions, building the legal capacity in the various institutions is critical, including the Bank of Lao, various ministries (Finance, Commerce, etc.) and banks.

C. Implementing Institutions

Banks. Laos has a small and relatively inactive banking sector that includes domestic and foreign banks. Outside the capital of Vientiane, there are few banking options for traders. The state of the banking sector represents a relatively early stage of development. The banking sector technically provides the key services that facilitate trade, practice reflects a shallow use of these services. These services include deposit, cash, international payment, loan remittance, ATM and Internet banking service, corporate banking, treasury, leasing, basic letters of credit, wire transfers and foreign exchange. Continuing the development of the banking sector is critical to traders. While much progress has been made, more needs to be done to allow more use of basic product offerings, more sophisticated product offerings, greater choice of financial services, and greater access to foreign exchange.

The Central Bank. Under the 1990 banking law, the Central Bank, “Bank of Lao,” was established and assumed responsibility for the following: 1) regulation and supervision of commercial and regional banks; 2) maintenance of foreign exchange reserves; 3) issuance and supervision of money for circulation; and 4) licensing, supervision, and regulation of financial services. Over the years, the Central Bank has somewhat loosened highly restricted activity on currency exchange, and converting Kip into hard currency is subject to availability, which causes foreign-invested enterprises to experience problems in securing hard currency. Overall, its operations facilitate trade only on the most basic level. For example, currency exchange rates are competitive, and fees for wiring money abroad are reasonable.

D. Supporting Institutions

The main supporting institution for securing money flows - the **financial crimes enforcement unit** - is a nascent organization within the Bank of Lao. It is very early in the development of this capacity. (See *Financial Crimes* section.)

E. Social Dynamics

The overall social dynamics of trade-related trade flows are relatively weak. While there has been increasing access to foreign currency and trade finance credit, it has been slow to emerge. The government, banks, smaller exporters and potential traders all state interest in better services and some seem focused on the need for change. Yet, their capacity and the number of programs and events for the general public that promote better understanding of trade-related money flows seem insufficient. Media coverage of stories are few. A greater awareness and education regarding currency and trade finance operations is necessary for banks and traders.

F. Recommendations

In light of the above, this Report recommends the following:

- *Increase the availability of trade finance products.* While some trade products are available, they are not in use. There are numerous ways to pursue this activity, including chambers of commerce and other business associations. Additionally, working with development agencies to set up trade finance facilities, including the technical assistance to develop appropriate outreach. Following the establishment of the basic trade finance products, expanding the use of other financial tools should be pursued in the longer term - tools such as currency swaps and options and inventory leasing.
- *Increase the institutional capacity to administer trade finance products.* A major reason for the lack of trade finance appears to be lack of institutional capacity to administer these mechanisms. Training could be provided to the relevant public and private institutions involved. Additionally, pursuing a targeted public awareness campaign with importers and exporters would help educate the business community.

XIV. Flow of People

A. Introduction

In the SEA CLIR TRADE region, Laos, not surprisingly, sees the lowest flow of people across its borders. Yet, land-locked Laos has seen its share of visitors rise dramatically. When Laos opened its borders to Westerners in 1988, only 600 persons visited, staying well within the official limit of 1,000.⁵⁶ In 2005, over 47,000 visitors from the US alone crossed the border. Total arrivals in 2005 passed the 1 million mark with 1,095,315 visitors arriving. By far the largest contingent, over sixty percent, arrived from Thailand (603,189), the second largest group coming from Vietnam (165,151). The US (47,427) ranked third and was followed by China (39,210) and France (35,371). Foreign-exchange revenues registered \$146 million in 2005, up from \$113 million in 2002. Laos is targeting two million arrivals generating \$290 million by 2010.

Overall, within Lao laws, public and private institutions, significant improvements have been made in the facilitation of the flows of trade-related people. The Lao government has lessened legal travel restrictions, streamlined processes and upgraded its automation. For example, as recently as 1990, the government had a monopoly on the tourism industry, and tourism was limited to group travel. Travel is open to the private sector now, and business has flourished.

In this chapter, we analyze legal, institutional and operational constraints that impede trade-related people flows. First, our analysis focuses on legal framework for trade-related visits. Second, we consider the institutional issues regarding people flows. Third, we review other key institutions involved in facilitation, such as police. Lastly, we identify major recommendations to improve facilitation of trade-related people flows.

B. Legal Framework

The legal framework supports the most basic trade facilitation principles, especially for regional movements of business travelers. Relatively restrictive policies and procedures are in place, however, for non-regional visitors regarding tourism and business. Lao's legal regime could better accommodate these travelers for the sake of the country's own economic development.

Laws and Regulations that support Trade Facilitation. Laos has a few key programs that facilitate tourism and business travel. For example, Laos has exempted visas for tourists from a number of key countries and trading partners, such as Vietnam, China, Cambodia, North Korea, Russia, Malaysia, Philippines and Thailand. Also, Lao laws allow business-related travelers visas for 30-days with extensions upon request. Additionally, Laos has facilitated travel by allowing visas to be acquired at border sites on arrival. While visas differentiate between tourists and business travelers, the procedures do not favor one above the other.

⁵⁶ Lao National Tourism Administration, Tourism Statistics 2005.

Legal and Regulatory Issues to Address. Laos can further improve trade facilitation by providing easier, yet secure, access for a wider group of tourists and business travelers from additional countries than the limited current eligible ones. For example, neighboring Vietnam has signed agreements on visa exemption with 38 countries and is joining the APEC Business Travel Card (ABTC) program.

C. Implementing Institution

Overall, the major implementing institution, the Ministry of Justice, appears to have a clear mission, and active leadership that has made numerous changes in the past decade. A lack of transparency, however, common to many public agencies, creates difficulties in administration.

Immigration Operations that Support Trade Facilitation. Lao's system for those seeking short-term and longer trade-related stays is considered improved. As noted in the legal section, visa on arrival has facilitated arrivals. Experience is generally that consular services execute visas without great delay. International visitors who seek to extend their stay may do so with little difficulty. The immigration agency is seen as generally responsive to inquiries, and its fees are reasonable. Lao immigration officials use watch lists from the INTERPOL, UN, US and other sources to monitor entry and exit of dangerous persons. This procedure however is not executed electronically in some sites. Lao's airport tax is nominal and transparently administered.

Immigration Issues to Address. Compared to other issues addressed by the diagnostic, Lao's Immigration Agency has few major issues to address. Automation is a key issue for modernizing the visitor process. Also, corruption, while perceived as currently low, should receive appropriate vigilance as Lao progresses generally.

D. Supporting Institutions

The Immigration Agency administers the laws, while the **police**, under the **Ministry of Public Security**, provide the law enforcement function, such as detentions and arrests. The police force is considered by some to be a constructive partner. The **Lao National Administration for Tourism** is viewed as a partner in trade-related people flows. The organization receives support from the government. It has a focused mission and is well-organized. The **legal profession** provides a supporting function to trade community by intermediating transactions between trade-related people seeking longer stays in Lao.

Basic **infrastructure and services** regarding people flows are considered poor but improving. Laos has two major international airports in Vientiane and Luang Prabang, where there are daily direct flights from limited cities in the region. Key hubs include Vietnam (Hanoi), Cambodia (Phnom Penh), and Thailand (Bangkok). However, few airlines serve the country, including Bangkok Airways, EVA, Laos Airlines, Thai Airways and Vietnam Airlines. Intra-country airline service accommodates travels with flights between Vientiane, Luang Prabang and Pakse and other regional centers. (Vientiane and Luang Prabang airports were built with the aid of development agencies.) Luang Prabang provides an excellent example of the connection between trade infrastructure and commerce. Due to airport improvements and increased airlines such as Bangkok Airways; Luang Prabang has seen an increase from 3,945 visitors in 2001 to 33,064 in

2005. Intra-country road travel is poor but improving due to recent infrastructure upgrades. Yet, more and significant improvements are necessary. Passenger rail service is non-existent.

One particular highlight regarding people flows is traffic across the Mitraphab (Friendship) bridge, which opened in 1994. The Friendship bridge is the most important international checkpoint, with 541,016 arrivals. These arrivals dwarf the 105,533 arrivals at Wattay International Airport in Vientiane. Between 2001 and 2005, arrivals at the Friendship Bridge surged from 355,192 to 541,016.

E. Social Dynamics

Improving trade-related people flows receives some critical support in Laos. The government has made significant changes from within a relatively insular regime. People flows in the form of tourism are widely supported and encouraged at all levels – executive branch, legislature, private institutions and the general public. There appears to be a degree of complacency, however, with current Lao institutions and practices, although there is need for continued reform.

F. Recommendations

In light of the above, this Report recommends the following:

- *Continue to improve the visa system for easier access for trade-related visitors.* Laos should consider more revisions to its visa system for tourism and business travelers to provide greater and easier access for those interested in visiting, trading and investing in the country. Significant trading partners and countries that supply or may supply FDI should receive primary consideration. Regarding business travel, Laos should consider joining the APEC initiative to facilitate business travel - APEC Business Travel Card (ABTC) program. Under the ABTC, card holders will be able to be exempted from visa and resident registration procedures and use express immigration lanes in 16 other countries.⁵⁷ ABTC card holders are allowed 60 day stays for each visit.
- *Upgrade the professionalism and modernization of the Immigration Agency.* The Government should assist the Immigration Agency in implementation of integrity program, including strengthened independent internal affairs. The Government should also develop a comprehensive personnel system for the Immigration Agency that would upgrade candidate qualifications, improve recruitment procedures, establish job-specific performance and evaluation standards.
- *Modernize and upgrade automation for people-processing at the border.* Development of a stronger information technology system should be pursued. This upgrade should include an enhanced risk analysis system.

⁵⁷ The ABTC was initiated by Australia in 1996 and has been applied in three founding member countries - Australia, Korea and the Philippines. So far, 17 APEC member economies have joined the ABTC programme, including Australia, Brunei, Chile, China, Hong Kong, Indonesia, Japan, the RoK, Malaysia, New Zealand, Papua New Guinea, Peru, the Philippines, Singapore, Taiwan, Thailand and Vietnam.

XV. Financial Crimes

A. Introduction

Financial crimes, including money laundering and terrorist financing, are not a primary focus of the Lao government, nor do they appear at the moment to be a pressing problem in Laos. The conditions are, however, ripe for exploitation. Laos operates on a largely cash economy, has relatively porous borders, weak central banking controls, and unsophisticated law enforcement and banking sectors. One reason why financial crimes do not seem urgent, is that so little is known about the true picture of money flows into and out of the country. The most significant known source of illegal capital is proceeds from drugs, which may amount to between \$70-80 million in revenue for traffickers per year, followed by illegal logging. There have also been discoveries of counterfeit U.S. currency and the occasional seizing of large sums of cash in a briefcase at the airport. But this appears to be the extent of active monitoring by the government of potentially illegal financial flows.

The Lao government is beginning to take measures aimed at prevention. It has signed the UN Treaties on drugs and transnational crime, which define measures to combat money laundering and seizing proceeds of illicit activity. Laos is also working to create a Financial Intelligence Unit (FIU) at the central bank with authority to coordinate and monitor anti-money laundering policies. The UN Office of Drugs and Crime (UNODC) and the Asian Development Bank have been giving technical assistance to the Lao government to build capacity and increase compliance in the area of financial crimes.

But there is a long way to go. The law forming the FIU, an anti-money laundering law, an anti-terrorist financing law, and revisions to the penal code that would criminalize related acts of laundering and bribery are still in draft phase, and little information was available as to the specific content of the drafts or the timing of their enactment.

B. Legal Framework

The Lao legal code has scant reference to financial crimes. Laos is party to the United Nations Convention Against Transnational Organized Crime (December 2000), the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic (1988) and is a signatory of United Nations Convention Against Corruption (December 2003). But at the time of writing it was not a signatory to the Convention for the Suppression of the Financing of Terrorism (September 2002). Beyond signing these treaties, however, little if anything has been done to incorporate the treaties' provisions into law. According to officials at the National Bank of Laos, a draft law on the prevention of money laundering that includes anti-terrorism finance components has been drafted based on an ADB model. Also a draft law on forming an FIU is pending submission to the parliament. Neither draft was available for review.

Any regulation that does occur in the area of financial crimes is through the central bank of Laos, which has authority to supervise and regulate all domestic and foreign banks operating in Laos. The Law on the Bank of Lao PDR, No. 5/NA October 14, 1995 (Article 5), states that Bank of

the Lao PDR has a duty of Administering and supervising the operations of commercial banks and financial institutions under its supervision to ensure the stability and the development of the banking system and financial institutions.

Under this authority the central bank has issued guidelines binding all banks operating in Laos to keep accurate customer identification information for all parties opening accounts and to report any suspicious transactions, including all transactions involving amounts in excess of [USD\$10,000]. The guidelines fall short of FATF requirements, however, and in particular do not impose an obligation for banks to proactively monitor the identity of account holders or conduct probing research into the beneficial ownership of accounts. In fact, it appeared from interviews with banks, however, that the more rigorous regulations were imposed by foreign regulations governing financial controls that are now prerequisites for establishing foreign correspondent banking relationships.

The Banking Law (Article 56) does make it an offence to provide false information to the central bank, including disclosure of account information, such that “Any person who intentionally supplies any false or misleading information to the Bank of the Lao PDR shall be fined or punished in accordance with regulations.”

In the event of a criminal investigation, the Lao banking law provides for the freezing of assets, and ultimately confiscation of those assets upon conviction (Article 32). Confiscation “may only be imposed in serious cases as stated in the specific part of this law” and “in the event that partial confiscation of property is imposed, the court must set up a clear list of the property to be confiscated.” The law also provides for confiscation of “items that were used in the offence or in the preparation for the offence, or that were obtained from an intentional offence.” Furthermore, “Items belonging to other individuals used in the offence shall be confiscated by the State if the owner lending them is not in good faith or if confiscation is deemed necessary for national security.”

Banks pledge individually to keep customer information secret and secure, but there is no bank secrecy law that would prohibit investigations by appropriate authorities from being conducted into suspicious activities or accounts. Banks are required to pass along information on suspicious transactions or accounts to the Central Bank, which has wide latitude to decide what action to take regarding criminal enforcement.

The Lao government has also recently passed an anti-corruption law, but no English translation was available at the time of the assessment. One international organization that reviewed the law in Laotian pointed out a significant deficiency in that the law itself focuses on prevention but fails to criminalize corruption. That task is left to a revision of the criminal code, and it was uncertain when such a revision would occur.

The Lao legal system tends to be highly informal in the area of criminal enforcement. The strong impression left from several interviews was that if a significant financial crime occurred that the government agreed was a problem, the rules and laws are flexible enough to achieve swift action to perform and investigation, seizure, prosecution or extradition. On the other hand, a politically sensitive case, or one that did not have the government’s full attention would likely not be

pursued independently by the legal system. This factor is currently far more significant than anything written in the Lao legal codes.

C. Implementing Institutions

The Bank of Laos. The central bank is the principal organization for implementing financial crime prevention measures. It is empowered to receive information on accounts and transactions from member banks and is the central authority for disseminating that information to other government agencies or the court about financial crimes that involve the banking sector. Any account freeze orders will be executed through the National Bank. International cooperation regarding financial crimes information must also be coordinated with the Ministry of Foreign Affairs and the Ministry of Justice. The Central Bank works in concert with international donors to offer occasional trainings to member banks regarding prevention of money laundering. Generally speaking, however, the bank's technical capacity and expertise is limited with regard to understanding, detecting, preventing and prosecuting financial crimes.

The Financial Investigation Unit. Laos does not currently have a Financial Intelligence Unit (FIU) to coordinate policies and practices relating to financial crimes. The Government is working with UNODC, the ADB, and bilateral donors including Australia to establish such an institution, but is at the very beginning of its start up phase. A draft law has been created that, according to an international expert who had reviewed it, makes a good start, but does not succeed in matching all of the requirements of the FATF 40 Recommendations and other international standards. A director has also been designated for when the FIU begins. If the operations of the central bank are an indication, upon commencement, it will be a challenge to equip the FIU with adequate staff and physical resources, such as computers, phones, or office supplies. Observers point out that the entire banking sector is in its infancy, and one must expect that the FIU and other institutions that should play a role in financial crime enforcement will have to crawl before they can walk.

The courts. In practice, few if any cases go before the Laotian courts regarding financial crimes. It is therefore difficult to evaluate the effectiveness of the courts as an implementing institution. Given the courts' relative lack of sophistication with regard to commercial matters, one can expect that the courts would not easily deal with a complex case involving money laundering or terrorist financing. The United States government, the ADB, and the UNODC have provided training to the courts designed to educate them about financial crimes identification and investigation aimed at increasing their capacity to handle such cases in a systematic fashion.

On the other hand, the courts can be quite efficient in resolving criminal matters in general, and the usual impediments to judicial investigations into financial crimes – such as subpoenaing financial records, seizing assets, or effecting extradition orders – may be swiftly overcome in cases where the Lao government supports the investigation or is cooperating with a foreign government in an investigation. For example, it was reported to the assessment team that a recent case in which Chinese intelligence requested that the Lao Government extradite drug trafficking suspects to Burma, which had jurisdiction to prosecute the offense, was swiftly and successfully resolved. One cannot expect a similar outcome, however, without the Lao Government's support.

D. Supporting Institutions

Considering that financial crimes are not a significant issue in Laos, it is not surprising that very little infrastructure supports their prevention or punishment. As supporting institutions, banks appear to be doing their part by monitoring customer accounts and by dutifully reporting suspicious transactions to the Central Bank. Accounting and auditing standards, however, are generally very low, apart from independent operations of some foreign-owned banks and therefore it is difficult to evaluate how effective these initial monitoring activities are. Also, the lack of integrated computerization of the banking industry makes it much more difficult to evaluate suspicious financial flows across the system.

The best supporting institution in the area of financial crimes is in fact the foreign banks that have correspondent relationships with Lao banks and thus impose more rigorous Western standards of accounting, auditing, and customer tracking. Several banks mentioned that they made changes to their systems following the enactment of the Patriot Act, and its long-arm controls of all banks connected to the U.S. or European banking system. The practices of neighboring banks also determine the extent to which illicit proceeds from Laos may be freely laundered out of the country. Thus foreign financial regulations are an important vehicle for change with Laos.

There are several important donor programs aimed at improving the capacity of the central bank and supporting institutions to understand and monitor financial crimes. The UNODC and World Bank have a program designed to help the Lao government implement the international treaties on anti-money laundering and anti-terrorist financing, which includes support and training for the FIU. The ADB has also been working to increase the monitoring and information capacity of the central bank. The Australian Financial Intelligence Unit has lent technical support to the establishment of the FIU. And the U.S. Embassy has conducted trainings related to prevention of terrorism financing. Laos is also an observer to the Asia Pacific Anti-Money Laundering Group, and intends to join once the anti-money laundering law is passed. Laos also participates in ASEAN regional conferences on money laundering. Taken together these programs are a vital source of support for the nascent financial regulatory system, and there is significant potential to expand these programs as the economy and financial system grows.

E. Social Dynamics

It is safe to say that financial crimes are not at the forefront of the public debate in Laos. As summarized by the 2006 U.S. State Department Laos country report on anti-money laundering activities: “Lao banks are not optimal for moving large amounts of money in any single transaction, due to the visibility of such movements in a small, low-tech environment. What money laundering does take place through Lao banks is likely to have been from illegal timber sales or domestic criminal activity, including drug trafficking.”

Corruption is a concern, but the issue was more often highlighted in the context of smaller scale bureaucratic corruption, as opposed to grand corruption involving large cash flows. This is not to say that the latter does not exist, but it did not appear to be part of the public discourse. Also,

given that the media is entirely state controlled, one cannot expect to hear much reporting on financial crimes that might be an embarrassment to the state.

The cash culture in Laos also keeps the issue of financial crimes under the radar screen. There are no good indications of the amount of cash in the black market economy, and it is thus difficult to estimate the scope of the problem. Cash businesses are a significant impediment to effective enforcement of financial crimes prevention measures. Without electronic or check payments, it is virtually impossible to detect where the proceeds of illegal transactions go. Moreover, Laos' relatively porous borders make it extremely difficult to detect when large sums of cash enter and leave the country.

One common nexus of financial crime missing from Laos is casinos. While casinos are legal, it is illegal for Lao citizens to enter them, and at the time of the assessment team's visit there were no significant casinos operating in the country.

The overall concern for Laos is that, while financial crimes may not be a significant problem now, one does not want it to become a weak link in the regional enforcement system. Without controls and capacity being put in place now, Laos could become a significant problem area once the economy grows and liberalizes in the future.

F. Recommendations

- Draft and adopt codes on money laundering, corruption, and terrorism financing that meet international standards.
- Initiate a process for acceding to all relevant treaties on financial crimes and integrating provisions into the existing legal code.
- Increase the resources and training for creating the FIU, including programs designed to reach out to related implementing institutions like banks and law enforcement.
- Invest in increased computerization and automation of central banking functions.
- Introduce training and incentives to improve the quality of financial auditing within the banking sector.
- Increase public awareness of the social and economic costs of corruption and financial crimes.
- Accede to the UN International Convention for the Suppression of Financing of Terrorism, and receive related technical assistance to devise mechanisms for domestic implementation.

XVI. Intellectual Property

A. Introduction

The culture of respect for intellectual property rights in Laos is essentially similar to that found in Cambodia and Vietnam – namely, there is little tradition or public reinforcement that supports such rights.⁵⁸ The fact that Laos' economy is so small, however, means that it presents far less of a threat to international commerce and foreign investment than that presented in particular by Vietnam, in that Laos produces no pirated materials and consumes few. For example, notwithstanding the lack of effective infrastructure in support of IPR, Laos is not on USTR's Section 301 "Watch List" for 2006.⁵⁹

The country's long-term interest in joining the World Trade Organization may force Laos to acknowledge IPR as a priority, after which the development and implementation of a comprehensive legal framework may follow. One other source of pressure for IPR protection may be the foreign investment community, particularly as foreigners seek to take advantage of Laos' low wage scale to manufacture products demanding design protection.

B. Legal Framework

IPR issues in Laos are addressed to a limited extent by a Government decree on trademarks enacted in 1995 and a decree pertaining to patents enacted in 1992. Although WIPO assisted Laos in drafting an intellectual property law in 1996, legislative action on the draft remains pending and the draft law appears to be dead.⁶⁰ A draft decree on patents was sent to the Prime Minister in February 2000 for approval and in 2002 the Prime Minister's Office issued patent regulations.⁶¹ Laos became a member of the ASEAN Common Filing System on patents in 2000, but lacks adequate personnel qualified to serve as patent examiners. Currently, no system exists to issue copyrights in Laos.

Laos became a member of the World Intellectual Property Organization (WIPO) Convention in January 1995 and the Paris Convention on the Protection of Industrial Property in October 1998. Laos has not joined the Bern Convention on Copyrights, however, nor any of the other major intellectual property conventions.

Laos's interest in joining the World Trade Organization has forced it to begin consideration of the enactment and implementation of a meaningful IPR regime in the near future. The WTO's first Working Party pertaining to Laos convened in October 2004. That Working Party identified IPR as a significant area mandating action prior to WTO accession.

⁵⁸ The Intellectual Property Rights (IPR) Section was completed following the in-country assessment that occurred in February 2006. The review provided in this section is based on information developed during the assessment, as well as on primary research materials as noted, and dates within this section reflect events following February 2006.

⁵⁹ Office of the United State Trade Representative, 2006 Special 301 Report, Watch List.

⁶⁰ U.S. Department of State, 2006 Investment Climate Statement on Laos, available at <http://www.state.gov/e/eb/ift/2006/62007.htm>.

⁶¹ Id.

Laos' bilateral trade agreement with the United States, which came into effect on February 4, 2005, also may lead to increased Government focus on IPR. The BTA normalized trade relations between the two countries and extended Normal Trade Relations status from the United States to products from Laos. In turn, Laos agreed to implement a variety of trade reforms, including the establishment of a regime to protect intellectual property rights. Its follow-through has proven sluggish, at best.

C. Implementing Institutions

The **Department of Intellectual Property, Standardization and Metrology** within the **Science, Technology and Environment Agency** of the Prime Minister's Office is charged with overseeing the development of a legal framework and implementing regime for IPR in Laos. Although understanding of IPR principles is weak in most other divisions of the Government, the leadership of the Department is relatively strong and engaged. During this Diagnostic, Agency staff demonstrated clear understanding of the IPR-related obligations that the country will assume under the WTO's agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). They also expressed a high degree of receptiveness to training on a short and long-term basis.

On the other hand, intellectual property rights are seldom enforced at Laos' borders. Small shops selling non-conforming goods are common in Vientiane. **Customs** officials stated that training in identifying counterfeit goods does not exist and that they are unfamiliar with procedures to be followed if counterfeit goods are encountered.

Although a few **judges** have received IPR training through donor-sponsored initiatives, commercial chamber judges fundamentally lack facility with IPR matters and continue to need significant training, regulatory guidance, and mentoring in this area.

D. Supporting Institutions

The **EC-ASEAN Intellectual Property Rights Cooperation Program** (ECAP II) is an effort by the European Union to strengthen TRIPS compliance throughout Asia, with a special emphasis on enforcement. Based in Bangkok, ECAP II provides IPR-related technical assistance to Laos and seems to be leading the effort to persuade the Government to move on the implementation of a new IPR law. In May 2005, ECAP II launched a program aimed at promoting public awareness, building IPR capacity, and legal drafting. Since then, ECAP has supported training of public officials, chiefly through study tours to Europe and within the region, to promote better understanding of IPR. Its more recent initiatives include a plant varieties audit and regulatory drafting initiative (February 2006) and a workshop for Ministry officials, SMEs, and university representatives on the topic of "using patent information as a tool for economic development" (May 2006).⁶²

Beyond these institutions the supporting environment for IPR in Laos remains negligible. No professional or trade organizations are up to the task at this time of independently promoting

⁶² See ECAP II website, <http://www.ecap-project.org/>.

awareness of, or compliance with Laos' existing regime. The **law school** is incapable of teaching IPR in any meaningful fashion, and the **media**, which is entirely controlled by the Government, similarly lacks the capacity to educate the public generally or specifically on the topic. There are at most two or three **private law firms** capable of guiding foreign investors and other private sector actors in the protection of their intellectual property rights.

That said, one source of change may lie within the **small community of manufacturers** of certain types of specialized products. A few small companies have been established in Laos for the purpose of designing and exporting elite wood furniture and textiles. One foreign investor provided an instructive anecdote concerning his experience of seeing his furniture designs copied and produced for sale. When he complained to the Ministry of Commerce about this alleged infringement of his rights, the Ministry reportedly sent a representative to the offending workshop to "unofficially" request that the copying of designs cease and desist. This effort proved successful, according to the foreign investor. It is his perception that the desire to avoid being targeted by the Government overrides any private interest in copying designs.

E. Social Dynamics

In Laos, there is virtually zero demand for IPR protection, and therefore almost none is supplied.. The latter emerges from a few motivated individuals and from a donor community that seeks to support Laos' entry into the world trading system. Although Laos may be carried along to a certain extent by regional developments in the area of IPR (for example, many of the interventions sponsored by ECAP II bring together representatives from different countries in the region), other priorities within its National Growth and Poverty Eradication Strategy⁶³ will likely take precedence over IPR in the near future.

F. Recommendations

In light of the above, this Report recommends the following:

- Encourage return to the matter of creating a legal and regulatory infrastructure for IPR.
- Continue to support the Department of Intellectual Property, Standardization and Metrology within the Science, Technology and Environment Agency for the purpose of building a leadership core in the area of IPR.
- Target the community of supporting institutions – including business associations, law schools and other institutions of higher learning, NGOs and even the media – for the purpose of building basic public understanding of the principles of IPR.
- Work with ECAP II to target most promising areas of IPR capacity-building.
- Build IPR course into judicial training program.

⁶³ National Growth and Poverty Eradication Strategy, supra note 1.

ATTACHMENT 1: COMPILATION OF RECOMMENDATIONS

COMPANY LAW AND CORPORATE GOVERNANCE

No.	Type	Recommendation	Priority	Duration
1.	Institutional reform/Legal reform	<p>Completely revise the company start-up process to make it simple, objective and quick. Specifically:</p> <ul style="list-style-type: none"> State all the requirements for company formation in one place in the new Company Law and state them objectively so that there is no room for discretion or “interpretation.” Make the registry’s role ministerial not discretionary. State that if the listed requirements are met, the registry must register the company within one day. Simplify all of the forms and have the same form for all companies – not separate forms for State offices vs. Provincial offices. State in the new Company Law that approval processes may be carried out simultaneously. Permit registration of a company before other approvals are obtained, so that a business can conduct start-up operations while some approvals are still pending. Consider establishing a “one-stop shop” system as many other countries have done. In this system one single Government body coordinates (and may issue) all necessary approvals following a uniform and consistent policy. 	<p>High</p> <p>High</p> <p>High</p> <p>High</p> <p>High</p>	<p>Short term</p> <p>Medium term</p> <p>Short term</p> <p>Short term</p> <p>Short term</p> <p>Medium term</p>
2.	Institutional strengthening/Technology	<p>Expand the Ministry of Commerce website to:</p> <ul style="list-style-type: none"> Set forth the above new procedures and policies. Set forth the text of the Company Law, all forms and all Ministry announcements and regulations. Provide statistics on companies such as those shown in the chart above in this Report. 	<p>Medium</p> <p>High</p> <p>Medium</p>	<p>Medium/Long term</p>
3.	Consensus building/Outreach	Publish and circulate the draft new Company Law for public comment and hold comment workshops with interested groups including the Chamber of Commerce, Bar Association, foreign investors, donors and others.	High	Medium/Long term
4.	Training	Establish training programs for State, Provincial and District staff on the simplified system for company formation.	High	Medium term

CONTRACT LAW AND ENFORCEMENT

No.	Type	Recommendation	Priority	Duration
1.	Legal reform	Laos needs a new Contract Law as the current law is simply not suitable for a modern market economy.	High	Long term
2.	Consensus building/Outreach	Motivate stakeholders to get involved in the process of drafting and developing the new commercial laws.	Medium	Short term
3.	Institutional strengthening	Help the Enforcement Agency. Until judgments can be enforced, the court system will continue to be weak and avoided. Some of the Office's problems (staffing, funding) cannot easily be reached by donors, but others (training, administration) can.	High	Short/ Medium term
4.	Training/Institutional reform	The notaries also need training and assistance. Laos' system of notary offices is unusual, if not unique, but notaries can serve important functions (fraud prevention, basic legal advice) in a civil law system. In the long term, the government might also be asked to consider moving from the centralized notary office system to a more typical system of semi-privatized notaries, as seen in Indonesia and Vietnam.	Medium	Medium term
5.	Training	Train judges in the Commercial Chamber in business law generally and in Contract Law in particular.	High	Short term

REAL PROPERTY LAW

No.	Type	Recommendation	Priority	Duration
1.	Legal and regulatory reform	<p>Without delay, implement Article 8 paragraph 2 of the Implementing Decree. This provision states: "With regards to the detailed division of rights and functions of the Land Management Agency of each local level, there shall be a separate regulation specifically issued by the National Land Management Agency." Implementation should include the following:</p> <ul style="list-style-type: none"> Describe those rights and functions precisely and without overlap; Combine them into fewer agencies and levels to the maximum extent that doing so is practicable and politically appropriate; Expand the scope of the regulation to specify in one place all of the approvals which are needed for the acquisition, use, lease, sale of and construction on land by a Lao citizen or a foreigner, and state the procedures for obtaining each approval and the time limit within which a proper application must be granted; and Expand the scope of the regulation to include the six Ministries as well as the Land 	<p>High</p> <p>High</p> <p>High</p> <p>High</p>	<p>Short term</p> <p>Medium term</p> <p>Medium term</p> <p>Medium</p>

No.	Type	Recommendation	Priority	Duration
		Management Agencies at each level.		term
2.	Outreach/ Education	Post, on the website of the Land Management Agency, the following: <ul style="list-style-type: none"> An early draft of the above regulation for public comment; The Land Law and the Implementing Decree; and All forms to be used for permits and all Land Management Authority announcements and other regulations. 	Medium Medium High	Medium/ Long term
3.	Legal reform	Encourage investment in Laos by making the rules and procedures for land use by foreign persons simpler, more transparent, and thus more secure. Consider the following: <ul style="list-style-type: none"> Allowing certain foreign persons (such as long-term residents and persons or companies making investments over a stated amount) to have land use rights the same as or similar to those of Lao citizens; and Issuing a formal regulation or law clarifying matters about which there may now be uncertainty such as rules for: foreign ownership of buildings and other attachments on land; companies or joint ventures which are partly foreign-owned; the holding of land by Lao citizens for the benefit of foreign persons; and eliminating or reducing investment license requirements for foreign holding of residential property. 	High Medium	Long term
4.	Training	Establish training programs for State, Provincial, District and Village officials on all of the above.	High	Medium term
5.	Promotion/ Monitor	Continue and encourage expansion of the titling project described above.	High	Long term

SECURED TRANSACTIONS LAW

No.	Type	Recommendation	Priority	Duration
1.	Legal reform/Legal drafting	Redraft the secured transaction law, with maximum possible publicity and stakeholder input while pursuing donor coordination.	Medium	Medium term
2.	Legal reform	In light of the problems with the court system, include provisions for expedited enforcement. Although self-help is an alien concept in Laos, it should be possible to make some use of Laos' strong tradition of non-court dispute resolution.	Medium	Short/ Medium term

No.	Type	Recommendation	Priority	Duration
3.	Institutional reform	Open a pledge registry office for movables. Ideally, this should have branches nationwide. Realistically, it may only be plausible in Vientiane at first. However, it might be possible to “piggyback” on an existing network, such as the system of notary offices.	Medium	Medium term
4.	Assessment/Legal reform	Investigate the possibility of drafting and passing laws for finance leasing and factoring (receivables financing).	Medium	Medium/Long term

BANKRUPTCY LAW

No.	Type	Recommendation	Priority	Duration
1.	Legal reform	Within the circumstances noted above, Laos is due for a new Bankruptcy Law. The current law simply does not work.	High	Long term
2.	Training	Administrator training should begin well in advance of the passage of a new law as A Bankruptcy Law is useless without administrators.	High	Short term
3.	Training	Commercial Court judges should receive comprehensive training in Bankruptcy Law, with respect to both concepts and procedures under the new law and the underlying principles of formal insolvency in a market economy.	High	Short term
4.	Outreach/Education	Supporting institutions, such as business groups, the law school, and the media, should be engaged as part of a public education initiative that emphasizes the importance of formal exit procedures and the removal of the social stigma that currently attaches to bankruptcy.	High	Long term
5.	Institutional capacity building/Technology	For the benefit of potential foreign investors who will be interested in the state of Laos’s bankruptcy system, an English-language version of the current law, with commentary, should be posted on commonly accessible Internet sites. When the new law is passed, it should promptly be translated and posted as well.	High	Long term

COMPETITION LAW AND POLICY

No.	Type	Recommendation	Priority	Duration
1.	Legal reform/Promotion/Education campaign	<p>Provided there is adequate Lao government support for introducing a competition law already, consider promoting passage and implementation of a competition law through a strategy that prioritizes awareness campaigns:</p> <ul style="list-style-type: none"> ▪ Develop a series of seminars to promote private sector support, drawing on examples from Laos and/or neighboring countries. ▪ Develop a series of seminars to educate the National Assembly and involved ministries about competition law. ▪ Prepare an advocacy brochure for the National Assembly members, explaining in clear, basic language the principle purposes of a competition law in the Lao context, drawing on examples from existing studies (e.g., Dahanayake report). ▪ Hold training seminars for the National Assembly and interested members of relevant ministries. 	<p>Medium</p> <p>Medium</p> <p>Medium</p> <p>Medium</p>	<p>Medium term</p> <p>Medium term</p> <p>Medium term</p> <p>Medium term</p>
2.	Legal drafting/Consensus building	Draft a competition law, soliciting input from the private sector, local think tanks, and international experts; and disseminate the draft widely for comments.	Medium	Medium term
3.	Outreach/Education	Promote a competition culture through public communication including: preparing communication/media materials; enhancing the capacity of media in publication of competition-related issues through dialogue/workshop with journalists; engaging in dialogue/workshops with related law enforcement officers, other government regulators, and the business and academic communities.	High	Long term
4.	Institutional capacity building	Following passage of the law, provide technical assistance to make the law operational, including assistance in the following areas: (a) planning and setting priorities of the new agency; (b) assistance in drafting any required implementing regulations; (c) developing internal agency operating procedures for handling complaints, investigations, and exemptions; and (d) training agency staff in case screening and investigative techniques.	Medium	Medium term
5.	Legal training	Develop university classes and regional training programs for staff.	Medium	Long term
6.	Assessment/Analysis/Monitor	Continue advocacy initiatives, including reviews of government policies and regulation affecting competition, and preparing studies on key sectors.	Medium	Long term

COMMERCIAL DISPUTE RESOLUTION

No.	Type	Recommendation	Priority	Duration
1.	Institutional capacity building/ Technology	Publish, catalogue, place in a hard copy and online central repository, and make accessible to all, the universe of law in Laos, including not only the “Kotmai,” but also decrees, ordinances, regulations and the decisions of the Supreme Court and the appellate courts.	Medium	Long term
2.	Institutional capacity building/ Monitor	For the benefit of foreign investors, catalogue, translate, and post online, the sub-group of laws, regulations, and court decisions that specifically pertain to commercial matters.	Medium	Long term
3.	Institutional capacity building/ Strategy development	The Law Faculty must significantly bolster its capacity in commercial law areas. A clear curriculum for law students should be spelled out and the local and donor community should develop a comprehensive plan for meeting the identified curricular needs, through contributions of faculty, materials, short and long-term training opportunities, and library resources.	High	Medium term
4.	Training	Training for judges in the Commercial Chamber over the next several years in each of the areas that they can expect to face cases on, including the topics of contracts, enterprises, bankruptcy, secured transactions, intellectual property, financing, and others.	High	Long term
5.	Private sector improvement	Similar to the Lao National Chamber of Commerce and Industry, the private bar should be encouraged to become more engaged in improving its legal framework and implementing the law.	High	Short term
6.	Outreach/Education	The media should be encouraged to inform the Lao people more effectively about the structure of commercial law in Laos, and in particular their ability to define and protect their legal rights through the use of contracts.	Medium	Short term
7.	Regional harmonization	Laos’ tradition of Alternative Dispute Resolution, and its integration of ADR into the legal framework, should be regarded as a best practice in the region.	Medium	Medium term

COURT ADMINISTRATION

No.	Type	Recommendation	Priority	Duration
1.	Institutional capacity building	Establish a legal database of laws, codes and court decisions that is published and readily available to all stakeholders in the legal system.	High	Long term
2.	Training	Concentrate on developing judicial training modules that increase capacity to understand more complex commercial disputes.	Medium	Medium/ Long term

No.	Type	Recommendation	Priority	Duration
3.	Institutional capacity building	Increase the technical capacity of the economic arbitration unit within the commercial dispute resolution process as an alternative to the currently slow and ineffective courts.	Medium	Medium term
4.	Institutional capacity building/Strategy	Centralize capacity for complex economic dispute resolution in a few commercial courts – perhaps one of first instance in each of the three regions hosting appellate court – rather than spread scarce resources across commercial chambers in a multitude of Provincial courts.	Medium	Short/ Medium term

FOREIGN DIRECT INVESTMENT

No.	Type	Recommendation	Priority	Duration
1.	Institutional capacity building/ Technology	Simple enhancements to the Department of Domestic and Foreign Investment’s website would improve the country’s image as a country that is “open for business.” For example, the DDFI should provide links in English to all laws, decrees and regulations that may be of interest to a foreign investor.	Medium	Short term
2.	Institutional reform/Monitor	Continue efforts to strengthen the Integrated Framework, as a means of hastening and improving coordination of commercial reforms. Continuously catalogue, monitor, coordinate, and leverage the wide variety of FDI-related donor initiatives.	High	Long term
3.	Institutional capacity building/Monitor	For the benefit of foreign investors, catalogue, translate, and place online, the sub-group of laws, regulations, and court decisions that specifically pertain to commercial matters.	Medium	Long term
4.	Private sector development	Direct programs on corporate governance, with an emphasis on attracting foreign capital, toward Laos’ small and mid-size domestic firms.	Medium	Short/ Medium term
5.	Regional partnership and harmonization	Encourage regional programs, in which officials from Laos are encouraged to work with their foreign investment counterparts from Vietnam, Thailand, and Cambodia.	Medium	Medium/ Long term

INTERNATIONAL TRADE LAW AND POLICY

No.	Type	Recommendation	Priority	Duration
1.	Analysis/Strategy development	Analyze lessons learned from the USAID/STAR program in Vietnam, particularly with respect to implementation of the BTA, for relevance and application to the U.S.-Laos BTA.	High	Short term
2.	Institutional capacity building	The Ministry of Commerce should be singled out for technical assistance and capacity building, with special attention given by donors to coordination of assistance and leveraging of resources.	High	Medium term
3.	Institutional capacity building/Outreach/Monitor	Publish, catalogue, place in both hard copy and online, central repositories, and make accessible to all, the universe of law in Laos, including not only the “Kotmai,” but also decrees, ordinances, regulations and the decisions of the Supreme Court and the appellate courts.	High	Long term
4.	Monitor	For the benefit of importers and exporters, catalogue, translate, and place online, the sub-group of laws, regulations, and court decisions that specifically pertain to trade.	High	Long term
5.	Compliance strengthening	Where Laos is failing in its commitments to implement its BTA with the United States, it should act immediately to remedy these failings. Compliance with the BTA will be viewed by potential trading partners as a basis for whether to do business in Laos.	High	Short term
6.	Partnerships/Facilitate trade processes	With respect to technical assistance for trade, donors should engage in a coordinated plan for the most effective use of resources in the short, mid, and long-term.	High	Short/ Medium/ Long term

FLOW OF GOODS AND SERVICES

No.	Type	Recommendation	Priority	Duration
1.	Institutional strengthening	Strengthen and centralize the Laotian Customs Agency by promulgating strong decrees based upon the new Customs law.	High	Medium term
2.	Customs Modernization/Technology/Strategy development	Automation initiatives should be continued and an IT strategy defined.	High	Medium/ Long term
3.	Customs modernization/Facilitate trade processes	Manual processes and data requirements should be streamlined and harmonized for both the import and export process.	High	Short term

No.	Type	Recommendation	Priority	Duration
4.	Customs modernization	Customs should perform essential Commerce functions and “licensing” should be eliminated.	High	Short term
5.	Customs modernization	Trade Statistics processes and validations should be analyzed and improvements made to the entire process.	Medium	Medium term
6.	Analysis/WTO compliance	The new Customs law and resulting decrees should be analyzed to ensure conformity with the WTO to speed accession.	Medium	Short/ Medium term
7.	Training	IPR training including the legal basis for enforcement should be conducted for Customs Officers.	Medium	Short term
8.	Customs modernization/ Education	A Code of Conduct and Table of Discipline needs to be established, promulgated and enforced.	High	Short/ Medium term
9.	Customs modernization/ Institutional capacity building	Internal controls, spot checks and internal integrity investigative capability should be established in Customs Headquarters.	High	Short term
10.	Facilitate trade processes	A complete list of fees and charges should be posted and available at Diagnostic and collection locations.	High	Short term
11.	Private/public sector partnership/ Institutional strengthening	<p>Strengthen dialog between the public and private sector through the following actions:</p> <ul style="list-style-type: none"> Support the start-up and continuation of the Lao Business Forum, a World Bank initiative, whose fundamental purpose is to upgrade the business climate through dialog between the public and private sector. This is under the local leadership of the NLCCI and the CPI (Committee on Planning and Investment) and has proven successful in both Vietnam and Cambodia. <p>Assist the NLCCI in growing into an organization which can offer a full range of quality services of its membership and influence public policy through the following actions:</p> <ul style="list-style-type: none"> Upgrade capacity of current staff in such areas as export promotion, market research, management and quality control and general human resource issues. This could be accomplished through visits to neighboring Chambers such as that of Vietnam to learn the basic of what and how a chamber should operate and then progress to more modern chambers in the region, such as Thailand. Develop system within chamber to track activities and results. This is critical in measuring success, providing follow up on pending issues, and demonstrating to prospective and current members the value of the organization. Support National Transport Facilitation Committee within Ministry of Transport 	<p>High</p> <p>High</p> <p>High</p> <p>Medium</p>	<p>Long term</p> <p>Medium term</p> <p>Medium term</p> <p>Medium term</p>

No.	Type	Recommendation	Priority	Duration
		<p>which will soon be expanded and renamed the National Trade Facilitation Committee. Its program is ambitious but has produced results in facilitating cross border trade within the transport industry. However, it needs additional staff and an upgrade of equipment to expedite implementation of the recommendations.</p> <ul style="list-style-type: none"> Establish a standing committee of Customs, both national and provincial and the trade community that meets regularly to discuss and resolve problems. This could serve as the conduit for the flow of information between the two. A subgroup of this would be a working group tasked with documenting, then streamlining current import/export documentation. 	High	Medium/ Long term
12.	Transport sector improvements	<p>Strengthen the Lao transport sector through the following actions:</p> <ul style="list-style-type: none"> Support implementation of the action plan of Department of Transport which addresses the major issues that confront the transport industry. The plan includes a donor study of how to upgrade Lao trucking companies. This has been completed and preliminary findings reported. Primary goals of the transport strategy include seeking outside investment for upgrading the fleet and reorganizing its resources and a general upgrading of the capacity of its players in modern inter-modal trade. Conduct training within the private transport industry, both the trucking sector and freight forwarders, in the concepts and complexities of modern, logistical services and supply chain management. Providers of such training material include FIATA, (International Federations of Freight Forwarders), TIFFA (Thai International Freight Forwarders Association) and SLA Singapore Logistics Association. The latter is held in high regard not only regionally but internationally and has offered to have its training materials used as the basis of a common training program for the region through the ASEAN Federation of Freight Forwarders Associations (AFFA). This can be accomplished through on site training courses, utilization of train the trainer concept, or tours of Lao freight forwarders and transport companies to their neighboring counterparts. 	<p>High</p> <p>High</p>	<p>Medium/ Long term</p> <p>Short/ Medium term</p>
13.	Customs modernization	Establish a program for licensing and oversight of Customs clearance agents and establish an association to represent their interests. The program must be effective in eliminating the incompetent players and the association must be proactive in updating its memberships as new procedures occur. It would also serve as the conduit for dialog on industry matters with Customs and viewed as a partner by Customs in the facilitation and control of trade.	Medium	Medium term
14.	Assessment/ Analysis	Conduct a feasibility study on the establishment of a cargo consolidation facility. Such a consolidation service would achieve economies of scale not now available to many	High	Short term

No.	Type	Recommendation	Priority	Duration
		exporters since most are small operations. Estimates are that such a project could lower transport costs from \$850 to \$900 per load (one way) to \$600 to \$650 by providing for a round trip haul.		
15.	Customs modernization/ Facilitate trade processes	Simplify export procedures through adoption of pro-export policy and system of Vietnam. Vietnam had diminished its intervention in exports and facilitated the process through use of an automated system linked with the trade. The exporter enters his export declaration into the system and electronically transmits it to Customs and the other pertinent agencies. If no indication of the need to examine is received within 24 hours, the shipment can be loaded for export. The concept is based on the principle that export discrepancies have little impact on the exporting country and should be discovered and resolved by the authorities in the country of import.	High	Medium term
16.	Customs modernization/ Facilitate trade processes	Implement the GMS (Greater Mekong Sub-region) Cross Border Transport Agreement's "single stop inspection" pilot beyond the Lao Bao border post with Vietnam as soon as possible and expand the project to include simplification and harmonization of export documentation. This must be done with input from the private sector. This one action would dramatically reduce time and costs to the exporter by eliminating almost all national interventions, reducing the documentation requirement and recognizing Customs as the agent for all border agencies.	High	Medium term
17.	Service improvement strategy/ Analysis/ Assessment	Design national trade related services to benefit from increased transit traffic resulting from completion of such major infrastructure project as the East-West corridor linking Thailand with Vietnam and the Northern economic corridor connecting China with Thailand. Estimates are that the latter will eventually extend from Beijing to the tip of Malay Peninsula. Increased trade volume and type of traffic flow should be studied to determine what opportunities this increased traffic presents to the trade service industry such as in consolidation services or logistical support.	High	Medium/ Long term
18.	Customs modernization	Improve transparency and competition in the selection and operation of warehouses that serve as Customs clearance sites. The bidding process including requirements of the operator and measurable performance standards should be developed with trade dialog and made public. Such steps would provide the government the maximum remuneration for the lease and the trade with a service more responsive to its need at a lower cost.	High	Short term

FLOW OF MONEY

No.	Type	Recommendation	Priority	Duration
1.	Financial sector improvement	Increase the availability of trade finance products. While some trade products are available, they are not in use. There are numerous ways to pursue this activity, including chambers of commerce and other business associations. Additionally, working with development agencies to set up trade finance facilities, including the technical assistance to develop appropriate outreach. Following the establishment of the basic trade finance products, expanding the use of other financial tools should be pursued in the longer term - - tools such as currency swaps and options and inventory leasing.	High	Medium/ Long term
2.	Institutional capacity building/Training/Education campaign	Increase the institutional capacity to administer trade finance products. A major reason for the lack of trade finance appears to be lack of institutional capacity to administer these mechanisms. Training could be provided to the relevant public and private institutions involved. Additionally, pursuing a targeted public awareness campaign with importers and exporters would help educate the business community.	Medium	Medium term

FLOW OF PEOPLE

No.	Type	Recommendation	Priority	Duration
1.	Legal and regulatory	Continue to improve the visa system for easier access for trade-related visitors. Laos should consider more revisions to its visa system for tourism and business travelers to provide greater and easier access for those interested in visiting, trading and investing in the country. Significant trading partners and countries that supply or may supply FDI should receive primary consideration. Regarding business travel, Laos should consider joining the APEC initiative to facilitate business travel - - APEC Business Travel Card (ABTC) program. Under the ABTC, card holders will be able to be exempted from visa and resident registration procedures and use express immigration lanes in 16 other countries. ABTC card holders are allowed 60 day stays for each visit.	Medium	Medium term
2.	Institutional strengthening/ Monitor	Upgrade the professionalism and modernization of the Immigration Agency. The Government should assist the Immigration Agency in implementation of integrity program, including strengthened independent internal affairs. The Government should also develop a comprehensive personnel system for the Immigration Agency that would upgrade candidate qualifications, improve recruitment procedures, and establish job-specific performance and evaluation standards.	Medium	Short term

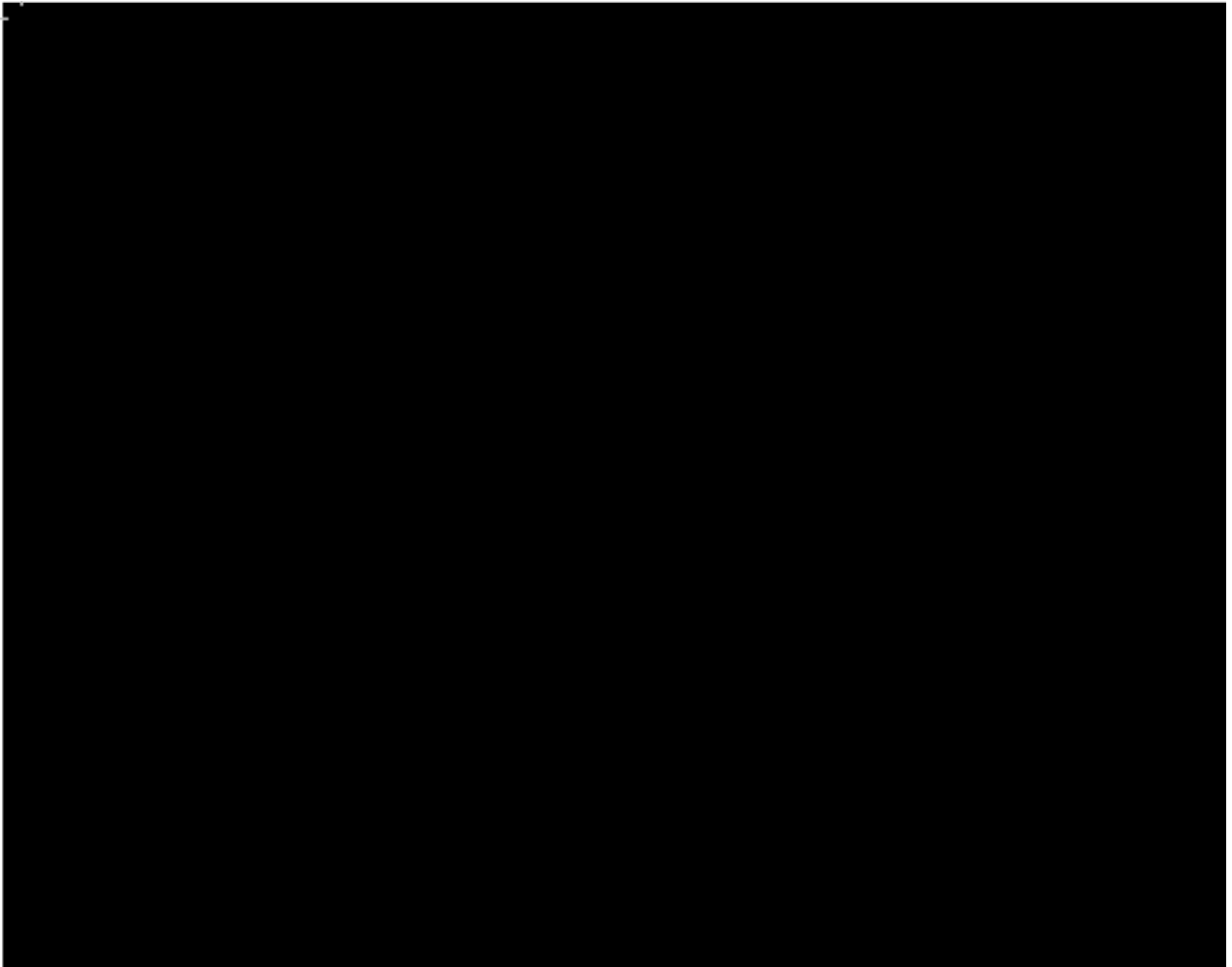
No.	Type	Recommendation	Priority	Duration
3.	Operational	Modernize and upgrade automation for people-processing at the border. Development of a stronger information technology system should be pursued. This upgrade should include an enhanced risk analysis system.	Medium	Medium term

FINANCIAL CRIMES

No.	Type	Recommendation	Priority	Duration
1.	Legal reform/Legal drafting	Draft and adopt codes on money laundering, corruption, and terrorism financing that meet international standards.	Medium	Long term
2.	Legal reform	Initiate a process for acceding to all relevant treaties on financial crimes and integrating provisions into the existing legal code.	Medium	Short/ Medium term
3.	Institutional capacity building	Increase the resources and training for creating the FIU, including programs designed to reach out to related implementing institutions like banks and law enforcement.	Medium	Short/ Medium term
4.	Institutional capacity building/ Technology	Invest in increased computerization and automation of central banking functions.	Medium	Medium term
5.	Training	Introduce training and incentives to improve the quality of financial auditing within the banking sector.	Medium	Short term
6.	Outreach/Education	Increase public awareness of the social and economic costs of corruption and financial crimes.	Medium	Long term
7.	International standardization	Accede to the UN International Convention for the Suppression of Financing of Terrorism, and receive related technical assistance to devise mechanisms for domestic implementation.	Medium	Medium term

INTELLECTUAL PROPERTY

No.	Type	Recommendation	Priority	Duration
1.	Legal and regulatory reform	Create a legal and regulatory infrastructure for IPR.	High	Medium term
2.	Institutional strengthening	Continue to support the Department of Intellectual Property, Standardization and Metrology within the Science, Technology and Environment Agency for the purpose of building a leadership core in the area of IPR.	High	Long term
3.	Outreach/Education	Target the community of supporting institutions – including business associations, law schools and other institutions of higher learning, NGOs and even the media – for the purpose of building basic public understanding of the principles of IPR.	Medium	Short term
4.	Partnership/ Institutional capacity building	Work with ECAP II to target most promising areas of IPR capacity-building.	High	Medium term
5.	Training	Build IPR course into judicial training program.	Medium	Medium term



Skip Kissinger, USAID/RDMA
Tel: ++662-263-7466
Email: skissinger@usaid.gov

Nick Klissas, USAID/EGAT
Tel: 202-712-0115
E-mail: nklissas@usaid.gov

Charles A. Schwartz, USAID/EGAT
Tel: 202-712-1761
E-mail: cschwartz@usaid.gov

Andrew Mayock, Booz Allen Hamilton
Tel: 703-902-5570
E-mail: mayock_andrew@bah.com